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ABSTRACT

This report evaluates the Civil Rights activities of five federal regulatory agencies. It is one of a series of six reports to be issued by the U.S. Commission on Civil Rights describing the structure, mechanisms, and procedures used by the federal departments and agencies in their efforts to end discrimination against this nation's minority and female citizens. The purpose of these reports, it is stated, is not to criticize particular departments and agencies, but, after a careful analysis, to offer recommendations for the improvement of those programs which require change. Highlights of the findings of this report, as stated, include the following: the regulatory agencies are charged with overseeing significant sectors of the American economy in the public interest; with one exception, none of the agencies have acknowledged responsibility for dealing with one of the most important components of their responsibilities--eliminating employment discrimination in the industries they regulate; the focus of efforts by two agencies to ensure non-discrimination in the services provided by the industries they regulate is primarily complaint oriented; and, in other civil rights impact areas, the regulatory agencies have been derelict in the pursuit of their public interest mandate. (Author/JM)

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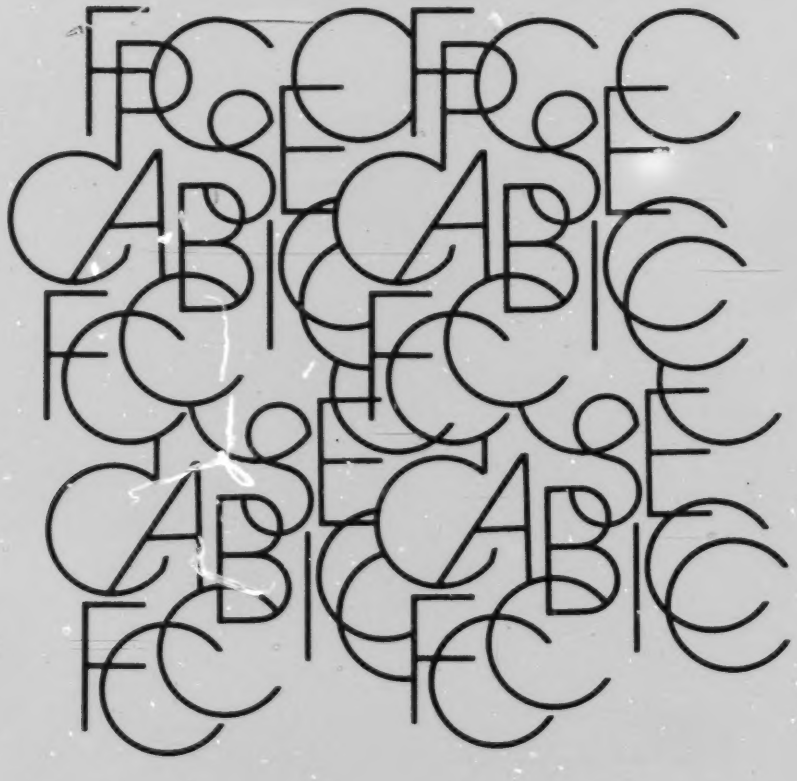
THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974

Volume I

To regulate in the Public Interest



A Report of
The United States
Commission on
Civil Rights
November 1974

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U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 to:

Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;

Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;

Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and

Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission:

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Robert S. Rankin
Manuel Ruiz, Jr.

John A. Buggs, Staff Director

LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C., NOVEMBER 1974

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

This report evaluates the civil rights activities of the regulatory agencies, the Federal Communications Commission (FCC), the Interstate Commerce Commission (ICC), the Civil Aeronautics Board (CAB), the Federal Power Commission (FPC), and the Securities and Exchange Commission (SEC). It is one of a series of six reports to be issued by this Commission describing the structure, mechanisms, and procedures utilized by the Federal departments and agencies in their efforts to end discrimination against this Nation's minority and female citizens. This series of publications represents our fourth followup to a September 1970 study of the Federal civil rights enforcement effort.

Our findings in this report show that although the regulatory agencies are charged with overseeing significant sectors of the American economy in the public interest, with the exception of FCC none of the agencies have acknowledged responsibility for dealing with one of the most important components of their responsibilities, eliminating employment discrimination in the industries they regulate. ICC, CAB, FPC, and SEC appear to assume that their independent regulatory status allows them to stand above the national commitment to equal employment opportunity. This Commission finds their position neither legally nor morally justifiable.

While the Federal Communications Commission has adopted rules prohibiting its licensees from discriminating in their employment practices, its enforcement program has been highly inadequate. FCC's guidelines defining the elements of the affirmative action programs required of licensees lack specificity and are not result oriented. The agency's handling of employment discrimination complaints is also inadequate. License renewal reviews of radio and television stations' employment patterns are used to identify licensees with severe underutilization of minorities and women, but the criteria used to identify these stations are overly restrictive and ignore several important factors.

The focus of efforts by ICC and CAB to ensure nondiscrimination in the services provided by the industries they regulate continues to be primarily complaint oriented. By contrast, FPC has developed a program of special reviews of recreational facilities to determine minority usage in addition to yearly reviews of such facilities. These reviews, however, are limited in numbers and, although low minority utilization rates have been identified at various projects, FPC has initiated no corrective action.

In other civil rights impact areas, the regulatory agencies have been derelict in the pursuit of their public interest mandate. For example, FCC and ICC continue to severely restrict minority involvement in the ownership of the industries they regulate through their licensing restrictions.

Other than its refusal to institute equal employment guidelines, SEC has reacted affirmatively to this Commission's past recommendations to strengthen its civil rights monitoring of regulatees. SEC has issued guidelines on civil rights disclosures which registering companies are required to make. Further, SEC has modified its proxy proposal regulations to allow the submission of civil rights oriented proposals.

We urge your consideration of the facts presented and ask for your leadership in ensuring implementation of recommendations made.

Respectfully,

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Robert S. Rankin
Manuel Ruiz, Jr.

John A. Buggs, Staff Director

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PREFACE

In October 1970 the Commission published its first across-the-board evaluation of the Federal Government's effort to end discrimination against American minorities. That report, The Federal Civil Rights Enforcement Effort, was followed by three reports, in May 1971, November 1971, and January 1973, which summarized the civil rights steps taken by the Government since the original report.

At the time we released the last report we indicated that we were conducting another analysis of Federal civil rights programs. This analysis is the Commission's most comprehensive. In order to enable the public to comprehend more fully each of the diverse parts of our study, we have decided to release each of its six sections independently over the next 7 months. After the regulatory agencies, we will publish reports on Federal civil rights efforts in the areas of housing, education, employment, federally-assisted programs, and policymaking. These reports will cover the activities of not only the most widely known agencies with civil rights responsibilities, such as the Departments of Health, Education, and Welfare, Housing and Urban Development, and Labor, but those which have received lesser public attention such as the Office of Management and Budget, the Office of Revenue Sharing of the Department of the Treasury, and the Federal Deposit Insurance Corporation.

This study was begun in November 1972. As we have done with all previous Commission studies of the Federal enforcement effort, detailed questionnaires were sent to agencies, extensive interviewing of Washington-based civil rights officials took place, and a vast number of documents were reviewed, including laws, regulations, agency handbooks and guidelines, compliance review reports, and books and reports authored by leading civil rights scholars. Volumes of data were also analysed from sources including the census, agency data banks, complaint investigations, and recipient application forms. For the first time Commission staff also talked to Federal civil rights officials in regional and district offices. Agency representatives were interviewed in Boston, Dallas, New Orleans, San Francisco, Los Angeles, and Chicago.

All of the agencies dealt with at length in our January 1973 report, The Federal Civil Rights Enforcement Effort--A Reassessment, were reviewed in this study with the exception of the Office of Economic Opportunity and the Economic Development Administration of the Department of Commerce. Those agencies had been so reduced in size and authority that we felt we could better utilize our resources by assigning them to monitor other agencies. This study covers some areas not analysed in the Reassessment report. We will be reporting on the efforts of the White House, the Equal Employment Opportunity Coordinating Council, the Office of Revenue Sharing of the Department of the Treasury, the education program of the Veterans Administration, and the Housing, Education, and Employment Sections of the Civil Rights Division of the Department of Justice.

In addition, this is the first of our studies on Federal enforcement activities to cover the Government's efforts to end discrimination based on

sex. The Commission's jurisdiction was expanded to include sex discrimination in October 1972. Information on sex discrimination is an integral part of each section of this study.

Nonetheless, this study is not an exhaustive one. Limits necessarily have been placed upon it, in terms of the laws, agencies, and programs covered. For example, the Voting Rights Act of 1965, which has been treated in previous Commission reports and which will be the subject of a separate Commission publication, was not covered. Further, in the sections dealing with the various Federal programs, it was not possible to treat more than a representative sample. For example, we have only covered the Department of Transportation's assistance for urban mass transit and highways, although that agency also provides aid to airports, railways, and the St. Lawrence Seaway Corporation. In other instances where all or many agencies have responsibilities but one agency is charged with the duty for overall enforcement, we will report only on the activities of the lead agencies. This is true in the case of the Civil Service Commission and the Federal equal employment program, and the Office of Federal Contract Compliance of Department of Labor and the Executive orders prohibiting discrimination by Federal contractors. Finally, due to restrictions of time and staff resources, there will be variation in the depth of treatment of the various programs and agencies.

To assure the accuracy of these reports, before final action, the Commission forwards copies of them in draft form to departments and agencies whose activities are discussed in detail to obtain their comments and suggestions. Thus far their responses have been helpful, serving to correct factual inaccuracies, clarify points which may not have been sufficiently clear, and provide updated information on activities undertaken subsequent to Commission staff investigations. These comments have been incorporated in the report. In cases where agencies expressed disagreement with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, their point of view, as well as that of the Commission, has been noted. In their comments, agencies sometimes provided new information not made available to Commission staff during the course of its interviews and investigations. Sometimes, the information was inconsistent with the information provided earlier. Although it was not always possible to evaluate this new information fully or to reconcile it with what was provided earlier, in the interest of assuring that agency compliance and enforcement activities are reported as comprehensively as possible, the new material has been noted in the report.

These reports will not deal primarily with the substantive impact of civil rights laws. The Commission will not attempt here to measure precise gains made by minority group members and women as a result of civil rights actions of the Federal Government. This will be the subject of other Commission studies. Rather, we will attempt to determine how well the Federal Government has done its civil rights enforcement job--to evaluate for the period of time between July 1972 and June 1974 the activities of a number of Federal agencies with important civil rights responsibilities.

The purpose of these reports is not to criticize particular departments and agencies, but after a careful analysis to offer recommendations for the improvement of those programs which require change. The Commission's efforts in this regard will not end with this series of reports. We will continue to issue periodic evaluations of Federal enforcement activities designed to end discrimination until such efforts are totally satisfactory.

FEDERAL COMMUNICATIONS COMMISSION (FCC)

I. Introduction

The Federal Communications Commission is an independent regulatory agency with broad responsibilities for the regulation in the public interest of radio and television broadcasting, cable television, and telephone and telegraph communication.[1/] The activities of each of these regulated industries encompass significant civil rights issues.

In employment, for example, FCC's jurisdiction extends not only to the largest nongovernmental employer, American Telephone and Telegraph Company, but to the industry with the greatest effect on the Nation's culture, television. Affirmative efforts by FCC to ensure equal employment opportunity by its licensees thus may have a profound impact on the economic and social status of minorities and women. In addition to the matter of employment discrimination, FCC is concerned with providing nondiscriminatory public access to participation in the business opportunities of the industries it regulates. Finally, the agency's public interest mandate requires it to facilitate the involvement of the public in its regulatory proceedings.

1/ FCC was created by the Communications Act of 1934 to provide unified regulation of all interstate and foreign communication by wire and radio.

II. Radio and Television Broadcasters

A. Equal Employment Opportunity

1. Responsibilities

Broadcasting is the transmission of programs by radio and television for general reception. Broadcast stations are generally privately owned and are run for profit:[2] the commodity they sell is air time for commercials.

FCC's regulation of broadcasting has three primary phases.[3] The first is the allocation of space in the radio frequency spectrum to the broadcast services such as radio and television. The second phase of regulation is the assignment of stations in each service area within the allocated frequency areas to avoid interference with other stations. The third phase is the regulation of existing stations, e.g., inspecting stations and processing applications for renewal of licenses.

2/ Although educational and other noncommercial stations share the airwaves, the American broadcasting system for the most part is a commercial system. Future Commission reports will cover the civil rights responsibilities of public television licensees and focus on alleged problems in these stations' employment practices, programming, and the composition of their boards of directors. For a discussion of those issues, see, for example, Office of Communication, United Church of Christ, Public Television Station Employment Practices and the Composition of Boards of Directors: The Status of Minorities and Women (January 1973); and Debate in the House of Representatives on Public Broadcasting (H.R. 8538 To Extend Certain Authorizations for the Corporation for Public Broadcasting and For Certain Construction Grants for Noncommercial Educational Television and Radio Broadcasting Facilities) 93rd Cong. Rec. H 6423-6452 (daily ed. July 20, 1973).

The Department of Health, Education, and Welfare (HEW) is beginning to undertake a more active role in examining public television licensees. Its responsibility to undertake this enforcement program stems from that agency's substantial award of grants to educational stations. In 1973, for example, HEW awarded over $13 million to 78 stations in 34 States under Title I of the Public Broadcasting Act, as amended. Department of Health, Education, and Welfare, HEW NEWS, C98, May 18, 1973.

3/ FCC, Information Bulletin, Broadcast Services, 2-B, Jan. 1, 1973.

Broadcast stations are licensed for 3-year periods to serve the public interest, convenience, and necessity. Because channels are limited and are part of the public domain, licensees are assigned important public responsibilities.[4/] When they apply for license renewal, their performance is reviewed by FCC to assure that they have operated in the public interest and in accord with the provisions of the Communications Act.

At the end of fiscal year 1972, FCC reported 8,115 operating radio and television stations.[5/] In 1972, the television industry had $2.75 billion in revenues and the radio industry, $1.26 billion.[6/]

FCC is the only regulatory agency to act to eliminate employment discrimination by its licensees. On July 23, 1968, FCC announced that discrimination on the basis of "race, color, religion, sex, or national origin" would constitute grounds for license revocation or the denial of a renewal.[7/] FCC's duty to take this action is rooted in constitutional principles, the national policy against discrimination in employment, as

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4/ For a discussion of FCC's license renewal procedures, see Section IIA2 infra.

5/ Included in this total were 511 commercial VHF-TV stations, 89 educational VHF-TV stations, 190 commercial UHF-TV, and 125 educational UHF-TV stations. There were 4,307 commericial AM, 28 educational AM, 2,344 commercial FM, and 521 educational FM radio stations. FCC, 38th Annual Report 31 (1973).

6/ Id. at 31, 32.

7/ Nondiscrimination in Employment Practices of Broadcast Licensees, 13 FCC 2d 766 (1968). FCC's action was taken after a petition was filed by the Office of Communication, the Board for Homelands Ministries, and the Commission for Racial Justice of the United Church of Christ, This Commission joined with the U.S. Department of Justice, more than 30 Senators and Representatives, and many religious and civic organizations in support of the petition.

embodied in Title VII of the 1964 Civil Rights Act,[8] as well as the Communications Act's broad directive that all broadcast licensees serve the "public interest, convenience and necessity."[9]

On June 4, 1969, FCC incorporated the substance of its ban on employment discrimination into formal rules and imposed upon all licensees the obligation to adopt affirmative programs to eliminate any vestiges of discrimination in their employment practices.[10] On May 20, 1970, FCC took

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8/ Title VII of the Civil Rights Act of 1964 as amended, prohibits employment discrimination by private employers, labor unions, employment agencies and State and local governments, on the basis of race, sex, religion, color, and national origin and established the Equal Employment Opportunity Commission to implement its provisions. For a detailed discussion of the activities of EEOC, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1975 - Employment ch. 3 (in print).

9/ The public interest standard and the national policy take on added importance when the unique nature of broadcasting is considered. The broadcast licensee, as a "public trustee," is authorized to use scarce and valuable broadcast frequencies for profit. FCC has stated that broadcasters must meet employment goals, just as Federal contractors must eliminate discrimination in their operations. "A mass media service to the public which is based entirely on a federal license under a public interest standard.... clearly parallels the Federal policy in contract awards." Nondiscrimination Broadcast Practices, supra note 7, at 769. Executive Order 11246, as amended by Executive Order 11375, forbids discrimination by persons entering into contracts with the Federal Government and requires the initiation of affirmative action to rectify any past discrimination.

10/ 18 FCC 2d 240 (1969). FCC required affirmative action programs after a number of parties, including the Department of Justice and this Commission, filed comments subsequent to the July 3, 1968, ruling, to the effect that a mere declaration of policy against employment discrimination was not enough to solve the problem. See, for example, the statement of the Department of Justice, which argued:

> many people will not complain even though they suspect or know they have been treated unfairly in respect either to initial employment or management practice.... Many people will not even seek employment where they believe discriminatory practices to exist, and ... individuals will have great difficulty in demonstrating the existence of discrimination where it does exist. Id. at 242.

two final steps to consolidate its enforcement powers over employment discrimination by licensees.[11/] FCC first required all broadcast licensees to file with it annual statistical reports, listing the number, by race, ethnicity, and sex, of persons employed in various work categories.[12/] Second, FCC directed all applicants for license renewals, assignments or transfers of control, and construction permits to file a copy of their "equal employment opportunity programs, indicating specific practices to be followed in order to assure equal employment opportunity for Negroes, Orientals, American Indians, and Spanish Surnamed Americans."[13/]

This latter filing requirement contained one important omission, licensees were not required to file programs relating to sex discrimination.[14/] However, on December 17, 1971, FCC amended its regulations to require licensees to submit an equal employment opportunity program covering women as well as minorities.[15/]

11/ 23 FCC 2d 430 (1970).

12/ 47 C.F.R. § 1.612 (1970). For a discussion of the annual employment reports, see Section IIA2a infra.

13/ This requirement was not made a formal part of FCC's rules. Instead, it was added as a new Part VI to FCC Forms 301, 303, 309, 311, 314, 315, 340, 342. 23 FCC 2d 430 (1970) (Appendix B). For a discussion of FCC's requirements for equal employment opportunity programs, see Section IIA2b infra.

14/ See Report and Order in Docket 18244, June 3, 1970.

15/ The Stern Community Law Firm, a public interest law firm, acting on behalf of the National Organization for Women, petitioned for amendments to the FCC rules to require stations to adopt and file with FCC "affirmative equal employment programs" to hire fair proportions of women at all levels of management. The new rules became effective in February 1972. See Report and Order in Docket No. 19296, Dec. 17, 1971.

2. Compliance Mechanisms[16]

a. Annual Employment Reports

All broadcast licensees with five or more full-time employees are required to file an annual employment profile report (FCC Form 395).[17] Licensees are required to report the number of full-time and part-time employees broken down by race, ethnicity, and sex. Employees for each group are further described by job category.[18] Licensees are also required to report by race, sex, and ethnicity on-the-job trainees in production and white-collar categories.[19]

The employment data filed with FCC must reflect the employment figures from any one payroll period in January, February, or March.[20] The report is to be filed annually by May 31 of each year. Licensees are instructed to return two copies of the form to FCC. In addition, FCC requires licensees to keep a copy of the report in their public files.[21]

16/ In late 1973, the Renewal Branch of FCC's Broadcast Bureau, in conjunction with the FCC's Industry Equal Employment Opportunity Unit, began to draft new and comprehensive procedures to facilitate implementation of FCC's prohibitions against employment discrimination. As of June 1974, the proposals were in draft form and were being readied for the FCC Commissioners.

17/ FCC Form 395 defines minority as including Negroes, American Indians, Orientals, and Spanish surnamed Americans. Spanish surnamed Americans include all persons of Mexican, Puerto Rican, Cuban, or Spanish origin. American Indians include Eskimos and Aleuts.

18/ The form lists nine job categories: Officials and Managers, Professionals, Technicians, Sales Workers, Office and Clericals, Craftsmen (Skilled), Operative (Semi-skilled), Laborers (Unskilled), and Service Workers. The job categories used by FCC are based upon those utilized by the Equal Employment Opportunity Commission in its annual reporting form, EEO-1, required of all employers with more than 100 employees. For a detailed description of each job category, see EEOC, Employer Information Report EEO-1 Instructions, Appendix, xxiii.

19/ FCC, Instructions for Completion of FCC Form 395, Annual Employment Report (Revised March 1972).

20/ The same payroll period should be used in each year's report. Id.

21/ Licensees are required to keep the reports in their files for 2 years. FCC is required to keep a copy of the report in its public files for 7 years. FCC generally files the reports by State. Id.

FCC has been collecting employment data on broadcast licensees since 1971;[22] however, until mid-1973, it had not made any effort to organize the information in any usable form.[23] In November 1972, the Office of Communication of the United Church of Christ[24] issued a comparative evaluation of the 1971 and 1972 annual employment reports filed by 609 commercial television stations.[25] This study reported a slight increase in minority employment in 1972 but no proportional change in female employment.[26] Soon after the issuance of this report, FCC

22/ The first annual employment reports were filed in May 1971 and the second in May 1972.

23/ In a recent letter to this Commission, FCC contended that soon after the May 21 deadline for filing the 1972 employment report, it began the process which led it to analyze and publish the data. Letter from Richard E. Wiley, Chairman, FCC, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, undated.

24/ The Office of Communication is a community action arm of the United Church of Christ which is involved in mass media. The Office of Communication encourages broadcasters to serve minority needs, to implement effective equal employment opportunity programs, and to provide full coverage of controversial issues of public importance in their service areas. Interview with Andrew J. Schwartzman, General Counsel, Office of Communication, United Church of Christ, May 4, 1973, in New York, N.Y.

25/ Copies of annual employment reports for 1971 and 1972 were supplied to the Office of Communication by the Chairman of FCC. The Office of Communication had requested the data because FCC was not utilizing the reports, it simply filed them in boxes by State.

26/ The study indicated that in 1972, 10 percent of the 39,071 full-time employees of the 609 commercial television stations were drawn from members of minority groups, a slight increase from the 9 percent reported in 1971. The proportion of female employees, 22 percent, did not change between 1971 and 1972. During this period, total employment of the stations rose by about 1 percent.

The figures also showed that 22.5 percent of the stations had no minorities in upper level postions. Over half of the stations had no women in management, and 75 percent of the women employees were engaged in office and clerical jobs. Office of Communication, United Church of Christ, Television Employment Practices: The Status of Minorities and Women (November 1972).

initiated a similar program to computerize the 1972 employment data of the entire broadcasting industry.[27] FCC's summary of the data was not published until June 1973.[28] The report, Employment in the Broadcasting Industry 1972,[29] condensed the data into two categories: Higher Pay and Lower Pay.[30] Although a summary is provided for all stations with five or more employees, only those having 10 or more employees are listed individually by State and community.[31] The report lists the name of

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27/ FCC Commissioner Nicholas Johnson issued a report in July 1973, which analyzed and ranked the performance of each of the network affiliates in the top 50 television markets in the country. The study included an analysis of minority and female employment at these 147 stations. Minority group employment grew from 10 percent in 1971 to 11.5 percent in 1972 according to the analysis. Women accounted for 22.1 percent of the positions at these stations in both years.

The report ranked the licensees by relating their minority and female employment to the presence of these groups in the population of the relevant SMSA. The result was a factor comparing two percentages. A station receiving a factor of 1.000 would be employing exactly the same percentage of minorities as reside in the SMSA. The station ranked 26th, for example, WKYC, Cleveland, employed 17.62 percent minorities in an SMSA with a minority population of 17.6 percent for a factor of 1.001. Commissioner Johnson recommended that all stations receiving factors of less than 0.500 receive serious investigation. N. Johnson, Broadcasting in America: The Performance of Network Affiliates in the Top 50 Markets 77-112 (July 1973).

28/ The Office of Communication took only 10 days to computerize the employment data for television licensees. Schwartzman interview, supra note 21. According to FCC:

> ...the major reason it took the FCC longer than the UCC is that the latter reported only on television stations, whereas the FCC data covered the ten-fold greater number of all broadcast facilities, radio and television. And...the FCC has put in two or three man-weeks each year in helping the UCC assemble the data for its reports. Wiley letter, supra note 23.

29/ The report was prepared by the Research Branch of FCC's Broadcast Bureau.

30/ Higher Pay includes the job categories of Officials and Managers, Professionals, Technicians, Sales Workers and Craftsmen (Skilled); Lower Pay includes Office and Clerical, Operatives (Semiskilled), Laborers (Unskilled), and Service Workers.

31/ At the end of each State listing is a State summary for all units with more than 10 employees.

the television market for each television station and the Standard Metropolitan Statistical Area (SMSA) for each radio station.[32/]

The FCC evaluation of the 1972 employment data for the entire broadcasting industry showed that minority group members constituted 10.6 percent of the industry's work force,[33/] while women represented 23 percent.[34/] On February 1, 1974, FCC issued a report on the 1973 data which showed an increase in minority employment to 11.7 percent of all broadcast industry personnel.[35/] The representation of women in the industry increased to 24 percent in 1973.[36/]

FCC has indicated that the computerization program will be continued for data collected in the annual employment reports. The usefulness of the project, however, is somewhat diminished by

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32/ For comparison purposes the 1971 employment figures are given below the 1972 totals for each station.

33/ The data was broken down by minority group: black (6.6 percent); persons of Spanish speaking background (3.0 percent); Orientals (0.6 percent); American Indians (0.4 percent). FCC, Employment in the Broadcasting Industry, 1972 (December 1973).

34/ In October 1973, the United Church of Christ released a study of the 1973 television licensee employment data. The report noted that the industry had made "impressive forward strides" over the last year in the hiring of blacks, Spanish surnamed Americans, and other ethnic minorities. Full-time employment of minority personnel had risen from 10 percent to 12 percent of the work force. The statistics on women, however, were not as encouraging; they made up 23 percent of the full-time work force and held only 9 percent of the jobs in the upper four job categories. Office of Communication, United Church of Christ, Television Station Employment Practices: The Status of Minorities and Women (October 1973).

35/ Blacks made up the largest minority group represented in the study with 7.5 percent of the total, an increase of 0.9 percent in 1973. Persons of Spanish speaking background were second with 3.2 percent, while Orientals had 0.6 percent, and American Indians had 0.4 percent representation in the industry work force. FCC Employment in the Broadcasting Industry, 1973 (Feb. 1, 1974).

36/ Id. For an analysis of this subject, see J. Dreyfuss, "Blacks and Television: Presence Without Power," The Washington Post, Sept. 3, 1974, B 1,2, Col. 1.

the length of time which has been required to issue FCC's findings.[37] Further, the data on minority and female employment which FCC published were faulty since they were not cross classified by race and sex. Thus minority women were, in effect, counted twice.[38] Since it requires the submission by its licensees of cross classified data[39] on minority employment, FCC's failure to utilize the information is inexcusable.

37/ The FCC report on the employment data received by May 31, 1972, was issued 12 months later and the 1973 report was issued on February 4, 1974, 9 months after FCC's receipt of the data. FCC, Employment in the Broadcasting Industry, 1972 (December 1973) and FCC, Employment in the Broadcasting Industry, 1974 (Feb. 1, 1974).

38/ FCC's compilation of data is in the categories of: Total Employees, Total of Females, and Minorities (Including Female Employees). FCC, Employment in the Broadcasting Industry, 1973 (Feb. 1, 1974).

39/ FCC's Form 395 requires licensees to report annually on minority employment cross classified by sex and job category. See notes 17 and 18 supra for a definition of minority groups and a description of job categories.

The data provided in the annual employment reports are of limited reliability. While the reports indicate the racial, ethnic, and sex composition of the industry work force, the job categories utilized by FCC are subject to misinterpretation. The definitions of each job category 40/ are not based on broadcasting positions and, therefore, do not adequately describe the duties of broadcast employees. 41/ As of March 22, 1974, FCC had not taken any action to clarify its job definitions or to ensure accurate and consistent reporting of employment data. 42/

40/ For definitions of job categories, see note 17 supra.

41/ For example, a person identified as a trainee might in fact be a janitor; a person said to be employed in the production department could be an unskilled laborer whose duties are moving property in a studio. In fact, the Bilingual Bicultural Coalition, a San Antonio, Texas, community group involved in broadcasting, cited instances where Mexican Americans employed as trainees at local stations were actually used for odd jobs, such as buying coffee and making deliveries. Complaints were filed with the Equal Employment Opportunity Commission in both cases. Interview with Victor Soto, Chairman, Bilingual Bicultural Coalition, Mar. 12, 1974, in San Antonio, Tex. FCC has stated, "The structure of the report is justified, we feel, since it adopts the EEOC model, and it minimizes the filing burdens on licensees subject to both FCC and EEOC jurisdiction (15 or more employees)." Wiley letter, supra note 23.

42/ FCC has received several informal complaints at its meetings with citizens groups concerning fraudulent reporting of employment data by licensees. The complaints were referred by FCC's Equal Employment Unit to the agency's Complaint and Compliance Division. As of March 22, 1974, no action had been taken on these charges. Interview with Lionel Monagas, Director, Equal Employment Opportunity Unit, FCC, Mar. 22, 1974. Similar charges have also been made in several petitions to deny license renewal filed against television licensees. Interview with Frank Lloyd, Director, Citizens Communications Center, Mar. 23, 1974.

b. Equal Employment Opportunity Programs

FCC requires every broadcast licensee with five or more employees to file an equal employment opportunity program and an analysis of the results it is expected to achieve, as part of its license renewal application.[43] The equal employment program is divided into three parts. In Part I, the applicant must describe the practices followed to ensure nondiscrimination; in Part II, the results which the employment program has achieved in the renewal period; and in Part III, the complaints concerning employment discrimination.[44]

(1) Part I

The instructions for the affirmative action plan for equal employment opportunity in Part I are divided into four sections and require the plan to address nondiscrimination in recruitment, in selection and hiring, in placement and promotion, and in other employment practices. The licensee must indicate specific practices it follows to ensure equal opportunity for blacks, Orientals, American Indians, Spanish surnamed Americans, and women.[45]

43/ The equal employment opportunity programs are also required of applicants for a construction permit for a new facility, for assignment of a license or construction permit, or for transfers of control (other than pro forma or involuntary assignments and transfers).

44/ FCC, Broadcast Application, Section VI. Parts I and II need not be filed "if the station has less than five full-time employees or if it is in an area where the relevant minorities are represented in such insignificant numbers that a program would not be meaningful." FCC does not, however, define what percentage of the population would be classified as "insignificant." Licensees, therefore, may not file plans in areas in which minorities exist in small, but nonetheless, significant numbers.

45/ Although all stations with five or more full-time employees must file Parts I and II pertaining to women , FCC instructions do not make this requirement clear. 23 FCC 430, Appendix B.

To assure nondiscrimination in recruitment, FCC requires licensees to publicize their commitment to equal opportunity in notices at station facilities, on employment applications, and in employment advertisements which have significant circulation among minorities and women. Further, licensees are advised to recruit through schools with significant minority enrollments, to maintain contacts with and encourage referrals from minority and women's organizations, to encourage present employees to refer female and minority applicants, and to inform all recruitment sources that qualified female and minority applicants are being sought.

With regard to selection and hiring, FCC has instructed licensees to inform personally those staff members who make hiring decisions that female and minority applicants for all jobs are to be hired without discrimination.[46/] Licensees are further required to cooperate with unions (where union agreements exist) to assure qualified females and minorities of equal employment opportunity and to include a nondiscrimination clause in new or renegotiated union agreements. FCC also requires licensees to avoid the use of any selection techniques or tests which have the effect of discriminating against women or minority groups. In other areas, the instructions are similarly broad and require female and minority employees to be given equal opportunity for placement, promotions, and pay; and to receive fringe benefits equivalent to those received by other employees performing similar tasks.

FCC's guidelines for equal employment opportunity programs are clearly not designed to bring about significant change in the employment practices of the broadcasting industry. In reality, what has occurred

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46/ FCC, Broadcast Application, supra note 44.

is that a large number of the licensees have merely copied FCC's broad guidelines and the agency, in turn, has accepted them.[47/]

The elements of a meaningful affirmative action program have been established by a number of Federal agencies: the Office of Federal Contract Compliance (OFCC) of the Department of Labor, the Equal Employment Opportunity Commission (EEOC), the Civil Service Commission, and the Department of Justice. These agencies have developed similar approaches and criteria for affirmative action plans. They all require that an employer conduct a utilization analysis to determine by job category and organizational unit the extent of its minority and female work force. Where an underutilization (fewer minority or female employees in the work force than would be expected by their availability in the relevant labor force) exists, a list of problems which caused the underutilization must be cited. The plan must specify actions to rectify the employment problems identified and set forth numerical goals, timetables, and intermediate objectives for overcoming the underutilization.[48/] Experience

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47/ Of programs reviewed by Commission staff, for example, one program repeated verbatim the FCC guidelines. This program was two pages long and was accepted without question by FCC. None of the programs had a staffing chart or evidenced any type of data analysis. Most programs averaged from three to five pages in length, again with most in the identical language of the guidelines.

48/ U.S. Civil Service Commission, Bulletin No. 713-25; EEOC, Affirmative Action and Equal Employment, A Guidebook for Employers (1973) and U.S. Department of Labor, OFCC, Revised Order No. 4, 41 C.F.R. § 60-2.2.

by each of these Federal agencies has demonstrated that where any of those key elements are omitted, the plan ceases to be a valuable tool for prompting change. FCC does not require the inclusion of any of these factors in its plan.[49/]

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance have adopted a series of special guidelines, e.g., on sex discrimination and testing.[50/] FCC has not developed any such criteria to guide its licensees. Since the majority of broadcasting licensees are covered by EEOC, it would appear prudent for FCC to adopt the standards outlined by EEOC for an effective affirmative action program. FCC has already accepted EEOC's approach for data collection and the two agencies cooperate on complaint handling. As of June 1974, FCC has merely required its regulatees to make a paper commitment to equal employment opportunity and perhaps expand their labor pool. Its guidelines are not calculated to assist broadcasters in realistically understanding what changes are required of them.

Simply put, the FCC requirements are not result oriented, as are other Federal affirmative action requirements. Their guidelines are merely a recitation of broad principle, the implementation of which probably will not have an appreciable effect on the extent of employment discrimination

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49/ FCC staff have indicated that the new proposals for equal employment opportunity compliance (see note 14 supra) will greatly parallel the requirements of OFCC's Revised Order No. 4. Monagas interview, supra note 42 and interview with Richard Shiben, Chief, Renewal Branch, Broadcast Bureau, FCC, Mar. 25, 1974.

50/ For a discussion of the activities of EEOC and OFCC, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1975 - Employment chs. 2 and 3 (in print).

in the broadcast industry.

(2) Part II

The second section of the supplement to the license renewal application on equal employment opportunity requires applicants to note how their equal employment opportunity practices affected the employment, hiring, and promotions of females and minority group members. These guidelines are written in the same broad language of Part I and do not require the licensee to conduct extensive analysis or evaluation of the operation of the program. For example, FCC does not specify that a licensee must collect and analyze data on the number of minorities and females represented in the total population of its service area; the number of minorities and females with specific qualifications in the labor force in this same area; the number of minority and female employees at all job levels within the company; and the number of applications, hires, promotions, training opportunities, transfers, and terminations over an extended period of time broken down by minority groupings and sex. Without this type of definitive analysis, it is impossible to evaluate accurately the success of the program in effecting equal employment opportunity.

(3) Part III

All licensees, regardless of staff size, must file the third section of the license renewal application relating to equal employment opportunity, which requires a description of any complaints which allege that the station unlawfully discriminated in employment practices.[51] If a complaint has been filed before any body having jurisdiction under Federal, State, territorial, or local law, the applicant must name the persons involved, the date of filing, the court or agency, the file number of the complaint, and a statement of the current status of the matter. FCC does not require, however, licensees to submit copies of discrimination complaints.[52]

c. License Renewal Reviews

Between 1968 and 1972, the focus of FCC's efforts to ensure non-discriminatory employment practices in the broadcast industry was primarily complaint oriented.[53] By May 1972, FCC had received annual employment data from all broadcast licensees for 2 years and, therefore, had a basis for the evaluation of the existing employment patterns. No action was taken by FCC, however, to make an annual comparative evaluation of employment data to identify problem areas.

On May 24, 1972, the Office of Communication of the United Church of Christ requested that FCC initiate an inquiry into the employment practices of the television stations in Massachusetts and defer the license[54]

51/ FCC Broadcast Application, supra note 44.

52/ Complaints are required to be kept on file by licensees for 3 years and these files are open for public inspection. Wiley letter, supra note 23.

53/ For a discussion of complaint handling at FCC, see Section IIA2d infra.

54/ For a discussion of FCC's license renewal procedures, see Section IIB infra.

renewals of those stations pending the results of the inquiry.[55] The request was based primarily on disparities between the percentages of minorities and women employed by each station and the percentages of minorities and women in the total population of each city of license.[56] FCC refused the request for an investigation indicating that there was insufficient data to warrant further proceedings and renewed the licenses of the stations.[57]

As a result of this complaint, however, FCC promised to do a comparative analysis of the next renewal group--the Pennsylvania and Delaware radio and television stations--in July 1972. The 1971 and 1972 annual employment reports of 27 television and 150 radio licensees were reviewed by FCC staff in conjunction with each station's equal employment

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55/ Letter from Rev. Everett C. Parker, Director, Office of Communication, United Church of Christ, to Dean Burch, Chairman, FCC, May 24, 1972.

56/ The Office of Communication had concluded from a study of the 1971 FCC Form 395 reports for each station that the licensees employed insignificant numbers of minority group members. This was particularly illustrated by the percentage of full-time black employees in the upper four job categories of Officials and Managers, Professionals, Technicians, and Salesworkers. Id.

57/ FCC stated that it did not feel justified in instituting investigative proceedings solely on the basis of 1 year's statistical data. Letter from Ben F. Waple, Secretary, FCC, to Rev. Everett C. Parker, Director, Office of Communication, United Church of Christ, May 24, 1972. Commissioner Nicholas Johnson dissented from the opinion of the majority and indicated that the statistical data constituted a prima facie case of racial discrimination which required an investigation. He further stated that, at the very least, FCC ought to defer the renewals of the stations in question or grant short term renewals so that a decision could be made as soon as adequate statistics were available.

opportunity program.[58] Based on this examination, FCC sent equal employment opportunity inquiry letters to 30 stations requesting additional information on the licensees' efforts to provide equal employment opportunity to minority group members and women.[59]

The equal employment inquiries were directed to those stations which had more than 10 employees and had no women employees or showed a decline in their number, or were in areas with a minority population of 5 percent or more and employed no blacks or showed a decline in this category.[60] After receiving further information from the Pennsylvania and Delaware stations, FCC granted license renewals to 14 of the 30 stations. Four of the licenses were renewed with the proviso that the stations regularly inform FCC regarding implementation of their equal employment opportunity programs. Renewals of four other stations were deferred because of inadequate initial responses.[61] FCC also deferred action on renewal applications for the other eight stations because of petitions to deny filed against them.[62]

58/ Pennsylvania and Delaware Renewals, 36 FCC 2d 515 (July 28, 1972). The license terms for these actions expired on August 1, 1972. FCC deferred action on the renewal applications pending the resolution of the inquiry.

59/ In sum, FCC requested each of the 30 licensees to explain why it believed its employment record, as revealed in its 1971 and 1972 annual employment reports, was consistent with FCC's equal employment opportunity rules. Id.

60/ FCC Report No. 11035, Oct. 27, 1972.

61/ The four stations eventually received conditional license renewals. For a discussion of the provisions of this type of renewal action, see section II A2d infra.

62/ For a discussion of petitions to deny license renewals, see Section IIB2 infra.

The license renewal deferral program initiated with the Pennsylvania-Delaware stations was FCC's first attempt to develop a method of systematically identifying those broadcast licensees whose employment patterns should receive special attention. The criteria utilized by FCC, however, were severly restrictive and inadequate for analyzing minority and female underutilization. In the Pennsylvania-Delaware renewals, FCC only identified those licensees which "employed no blacks or showed a decline in this category,"[63/] although there is a significant Puerto Rican population located in Philadelphia.[64/] In subsequent renewal groups, FCC amended the criteria to "employed no minorities" but did not specify what minority groups would be looked at in a specific area. In the Florida renewals, for example, no individual evaluation of the employment of persons of Spanish speaking background was performed, although the Miami area has a large Cuban representation.[65/]

63/ Pennsylvania and Delaware Renewals, supra note 58, at 518.

64/ Although the 1970 census figures for Philadelphia indicate that only 1.5 percent of the population was of Puerto Rican origin, other estimates are as high as 7 percent. Census of Population: 1970. General Population Characteristics. Final Report PC(1)-B1. Table 67, p. 332. Census of the Population: 1970. Subject Reports. Final Report PC(2)-1E, Puerto Ricans in the United States. Table 13, Page 102. For various other estimates see Pennsylvania State Advisory Committee to the U.S. Commission on Civil Rights, In Search of a Better Life: The Education and Housing Problems of Puerto Ricans in Philadelphia iii (January 1974). See generally, U.S. Commission on Civil Rights, Counting the Forgotten: The 1970 Census Count of Persons of Spanish Speaking Background in the United States (1974).

65/ FCC, Florida License Renewals, Memorandum Opinion and Order, Jan. 3, 1974. According to the 1970 census, more than 10 percent of the population of Miami, Florida, is of Cuban origin. Census of Population: 1970, General Population Characteristics. Final Report PC(1)-B1. Table 67, p. 325. Census of Population: 1970. Subject Report, Final Report PC(2)-1C, Persons of Spanish Origin. Table 13, p. 157.

Moreover, no distinction was made between stations which operate in areas where a relatively high percentage of the labor market is minority and those which operate in areas with a lower minority representation in the labor market. In addition, a station could satisfy the FCC standard by employing only one black and one woman or one black woman in both 1971 and 1972. FCC also can make no reliable judgments about the change in the number or percentage of minority employees from year to year unless turnover and new hire data are available.

There are other serious inconsistencies in this method of dealing with the problem. A station with 60 employees whose minority employment had declined from 30 to 28, for example, would, under these guidelines, receive a letter despite its adequate overall showing. In addition, since one major criteria is the complete absence of minority employees, the present system will almost invariably focus on the smallest stations, those which are most likely to employ no minorities.

Further, this procedure completely ignores the occupational segregation facing females and minorities in the broadcasting industry. For example, stations which employ females only in office and clerical jobs and in numbers which do not decline will not be the focus of FCC inquiry. Alternate procedures and criteria have been suggested

by FCC officials and groups involved in broadcasting. For example, Commissioner Nicholas Johnson recommended that inquiry letters be sent to every station with 10 or more employees in communities which are more than 1 percent black, and (1) the station's black employment is less than the percentage of blacks in the community, or (2) the station has a lower proportion of blacks in high paying jobs than the proportion of all employees in high paying jobs. In addition, he recommended sending a letter to (3) every station with 10 or more employees that has no black employees and deferring renewal until adequate explanations were received from the stations. Commissioner Johnson advocated considering short term renewals (requiring only a new equal employment showing in a year) for stations in the bottom 20 percent of these criteria. Letters would also be sent to (4) stations with 10 or more employees whose percentage of women in high paying jobs is less than 0.5 percent of the percentage of all employees that are in high paying jobs. Attention would also be focused on (5) stations with 10 or more employees which have no female employees or (6) whose percentage of female

employees has declined below the percentage of women in the work force in the city of license or SMSA.[66/] FCC, however, had taken no action as of June 1974 to revise its criteria for identifying licensees with questionable employment patterns.

66/ Pennsylvania and Delaware Renewals, supra note 58, at 519. The National Organization of Women (NOW) also submitted a proposed target selection procedure to identify problem areas in broadcast licensee employment practices. The procedure involves the following steps:

(1) Aggregate all employees in jobs classified by the licensee as officials and managers, professionals, technicians, salesworkers, and craftworkers.

(2) Multiply the total in Step 1 by the percentage of women in the relevant labor market and the percentage of the applicable minority group in the relevant labor market. (The relevant labor market will generally be the SMSA as defined by the Bureau of Labor Statistics.) This yields the number of expected jobs for females and each minority group.

(3) Separately aggregate the number of jobs classified as officials and managers, professionals, technicians, salesworkers and craftworkers held by females and those held by each minority group. This yields the observed number of jobs for each group.

(4) Separately, for females and each minority group, subtract the observed number of jobs from the expected number of jobs. This yields the Index of Possible Discrimination for each group.

(5) Aggregate the Indices derived in Step 4. This yields the Summary Index of Possible Discrimination.

(6) Using the Summary Index for each station, rank the licensees from the highest to the lowest. Obviously, the licensee with the highest Index is potentially the worst discriminator. Starting at the top, select the number desired for special attention.

NOW, Target Selection Procedure, Dec. 27, 1972. FCC assigned the proposal to the Industry Equal Employment Opportunity Unit for study and as of March 22, 1974, no decision had been made concerning the proposals. See Section V infra for a discussion of this unit.

The procedure utilized by FCC in the Pennsylvania-Delaware renewals did not require licensees to effect positive change to deal with discriminatory employment barriers.[67] Since its initial application, however, the procedure has been improved and systematized by FCC to bring about more substantial results. As of March 25, 1974, FCC had reviewed the license renewal applications of 10 renewal groups in conjunction with the equal employment criteria developed for Pennsylvania and Delaware licensees.[68] Based upon this review,[69] FCC sent letters of inquiry

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67/ FCC Commissioner Benjamin L. Hooks, in a statement on the Pennsylvania-Delaware renewals, indicated that he felt more of the stations deserved deferred licenses because of their poor compliance record. FCC Report No. 11035, supra note 60.

68/ FCC issues licenses to broadcast stations for 3-year periods. All licensees are divided by State into 18 renewal groups consisting of from two to six States each. Six groups a year are up for renewal with each group's renewal date spaced 2 months apart. For example, on October 1, 1974, the Renewal Branch will receive the applications of broadcast licensees in Arizona, Idaho, Nevada, New Mexico, Utah, and Wyoming; on December 1, 1974, from California, and on February 1, 1975, from stations in Alaska, Guam, Hawaii, Oregon, and Washington. Shiben interview, supra note 49.

69/ FCC's Renewal Branch reviews each licensee's equal employment opportunity program and annual employment reports for the previous 2 years. Subsequent to this analysis, the staff recommends which licensees should receive inquiry matters. These recommendations are referred to the Industry Equal Employment Unit for its review and approval. The inquiry letter recommendations are then submitted for final approbation to the FCC Commissioners in an agenda item which contains statistical documentation and census population figures for comparison purposes. Shiben interview, supra note 49.

to 357 stations [70] identified by the criteria in 25 States and the District of Columbia.[71]

The inquiry letters require the licensees to provide detailed information on job hires, terminations, and efforts to recruit minority

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70/ Licensees whose employment patterns fit the criteria are identified by a computer. All of these stations, however, may not receive an inquiry letter. The Renewal Branch of the Broadcast Bureau reviews the data to determine if good faith efforts toward equal employment have been made although the licensee shows an absence of or a decline in minority or female employment. In Michigan and Ohio, for example, although 73 stations were within the range of the criteria, only 58 received letters of inquiry. Further, FCC does not limit its activities to those licensees identified through the application of the criteria. After review of equal employment programs and annual employment reports, the Renewal Branch sends inquiry letters to some licensees whose employment patterns seem questionable although not falling under the criteria. Id.

71/ The letters of inquiry were sent to 48 stations in the District of Columbia, Maryland, Virginia, and West Virginia; 49 in North and South Carolina; 59 in Florida, Puerto Rico, and the Virgin Islands; 39 in Alabama and Georgia; 19 in Arkansas, Louisiana, and Mississippi; 36 in Indiana, Kentucky and Tennessee; 58 in Michigan and Ohio; 36 in Illinois and Wisconsin; and 13 in Iowa and Missouri. The renewal group consisting of Colorado, Minnesota, Montana, North Dakota, and South Dakota was in the process of identification for inquiry letters as of March 25, 1974. Id.

group members and women.[72] After staff analysis[73] of this information is completed,[74] FCC may choose to renew the station's license, defer action, or issue a conditional renewal. Recent renewal groups

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72/ Each licensee is instructed to submit:

(1) The names, job titles (using Form 395 job categories), departments, starting salary, and starting dates of all persons hired during the 12-month period preceding the pay period covered by the station's 1973 Annual Employment Report, stating each person's full-time or part-time status and designating those who are members of minority groups and/or women.

(2) The names, job titles (using Form 395 categories), departments, and termination dates of all persons terminated during the aforementioned 12-month period, stating each person's full-time or part-time status and designating those who are members of minority groups and/or women; and

(3) If there was an opportunity to hire during the aforementioned 12-month time period, details concerning the station's efforts to recruit minority group members to each position filled.

73/ FCC has indicated its opinion that statistical evidence is subject to various inferences and must always be viewed with caution. Compliance with FCC rules cannot be judged alone by whether or not a licensee employs minority and women individuals, but rather must be judged by reviewing the station's employment profile in conjunction with its equal employment opportunity program, the extent of its adherence to its program and good faith efforts to make it work. FCC does not indicate, however, how it plans to make these judgments, since the agency has no guidelines for evaluating equal employment opportunity programs.

74/ The responses to the inquiry letters are analyzed by the Renewal Branch which subsequently develops recommendations for final agency action. These recommendations are forwarded to the Industry Equal Employment Unit for its examination and approval prior to being submitted to the FCC Commissioners. Shiben interview, supra note 49.

have more frequently been issued renewals conditioned on two specific equal employment provisions.[75] These licensees must submit a list of minority and women's organizations, agencies,and community leaders with whom contact will be maintained for recruitment and community participation. Further, the licensee must submit to FCC, concurrently with its annual employment reports, a detailed statement on the affirmative action taken to seek and encourage minority and female applicants for each job opening.[76]

d. Complaint Resolution

The resolution of complaints receives a low priority in FCC's monitoring of its nondiscrimination prohibitions. Further, the methods utilized to handle civil rights complaints are often inconsistent and contradictory.

Complaints against broadcast licensees with less than 15 employees are to be reviewed by FCC as are any complaints which allege a pattern or practice of discrimination, i.e., systematic or institutional discrimination directed against a class of persons as opposed to an act of discrimination against a single person.

75/ In the Florida renewal group, for example, staff analysis indicated that of 384 full-time job opportunities which occurred during 1973, only six minority members were hired. Although women fared better, many of the 106 employed were in office and clerical positions. Subsequently, 12 stations were issued license renewals and 47 were granted conditional renewals. FCC, Memorandum Opinion and Order Inquiry into the Employment Practices of Certain Broadcast Stations Located in Florida, Jan. 10, 1974.

76/ The reports required by the conditional renewals will be submitted to FCC in 1974 for the first affected renewal groups with the annual employment reports. The reports will be sent to the agency's Research Bureau for computerization and a copy of the reports will go to the Renewal Branch. Only preliminary analysis will be accomplished in 1974; primary focus on the reports is scheduled for time of renewal. Shiben interview, supra note 49.

Individual complaints alleging employment discrimination against broadcast licensees with 15 or more employees are referred to EEOC.

FCC indicates that it will take cognizance of any final determination by EEOC. Subsequent to a complaint investigation, EEOC indicates whether it has found reasonable cause to believe that discrimination exists. In those cases where discrimination is found, the agency attempts to conciliate with the respondent, and if unsuccessful in resolving the matter, it may initiate legal action. FCC, however, has never defined what stage of EEOC's complaint process it considers to be a final determination. As of September 1974, for example, FCC had not initiated any action against WRC-TV, Washington, D.C., although EEOC had issued a decision finding reasonable cause to believe that the station discriminates in employment on the basis of sex and race. 77/ Further, in the license renewals of broadcast stations in Nevada and California, FCC ignored the fact that

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77/ In Naran Andreev v. National Broadcasting Company, Inc., WRC-TV, EEOC found reasonable cause to believe that WRC-TV engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 by discriminating against females because of their sex in (1) maintaining segregated job classifications and/or limiting employment of females in other categories, (2) its recruitment policies, and (3) its maternity leave policies. EEOC further found that WRC-TV discriminated against blacks because of their race by failing to hire blacks for supervisory positions. Voluntary conciliation efforts have thus far been unsuccessful. The National Organization for Women subsequently filed a petition to deny license renewal against WRC-TV, which, as of September 1974, was pending before FCC. It is FCC's position that the characterization that it has taken no action with regard to the EEOC reasonable cause finding in this matter is an inaccurate representation. It contends that "[t]hat case, along with many other documents and materials, is being considered in the pending WRC-TV renewal proceeding, which is the subject of a petition to deny. That proceeding is being taken in its turn, with no intent to delay. Wiley letter, supra note 23.

EEOC had found cause to believe that charges of unlawful employment practices against a licensee 78/ were justified. Instead of deferring action upon the license renewal applications pending the outcome of EEOC's actions, FCC granted the licenses. 79/

The failure to enter a binding conciliation agreement subsequent to such a ruling would seem to be a valid measure of a licensee's fulfillment of its public interest responsibilities during the license renewal period. FCC's failure to accept either EEOC reasonable cause findings or unsuccessful conciliations as a final determination results in a reliance solely upon the decisions in the court cases EEOC has brought.

78/ On March 29, 1971, EEOC found reasonable cause to believe that McClatchy Newspapers, Inc., had violated Title VII of the 1964 Civil Rights Act by discriminating against blacks, Spanish surnamed Americans, American Indians, and Orientals, on the basis of their race, color, and national origin, with respect to recruitment, hiring, training, and other terms and conditions of employment. Further, on December 6, 1971, the Director of the San Francisco District Office of EEOC made an official finding of fact that McClatchy was in violation of Title VII of the Civil Rights Act for denying job opportunities to women reporters because of their sex. Dissenting Opinion of Commissioner Nicholas Johnson on McClatchy Newspapers Nevada and California License Renewals, Mar. 15, 1972.

79/ On March 8, 1972, FCC granted McClatchy Newspapers' applications for renewal of licenses for two TV, four AM, and three FM radio stations. Id. FCC has also given little weight to civil rights complaints filed with State agencies against broadcast licensees. For example, on August 1, 1972, FCC deferred action on the renewal applications of 14 stations in the Pittsburgh, Pennsylvania, area after a request by the Pennsylvania Human Relations Commission for an opportunity to investigate complaints of employment discrimination filed against these stations. However, on December 20, 1972, FCC renewed the licenses of the stations and requested the Pennsylvania Commission to notify it of the results of the investigations. FCC Report No. 1198, Dec. 22, 1972. FCC's request, however, would not seem to indicate any real possibility of action in view of the agency's failure to act in the WRC-TV case.

Such a position ignores the fact the EEOC can litigate very few of the unsuccessfully conciliated reasonable cause decisions. In fiscal year 1973 alone, for example, there were approximately 1,500 reasonable cause decisions in which EEOC and the respondent could not reach agreement. Yet, between March 1972, the time EEOC obtained the authority to file lawsuits, and January 1974 it had filed only 150 cases. 80/ Thus, for FCC to act only on the outcome of an EEOC suit is to indicate that it intends to take almost no action.

If FCC took action on the basis of an EEOC reasonable cause decision, it would be supportive of EEOC's administrative authority and hopefully induce companies to conciliate. On the other hand, for FCC to adopt the posture of awaiting the outcome of a lawsuit before acting is extremely favorable to the licensee, since a court will either reject EEOC's position or issue an injunction directing the company to take specific actions. Thus, the licensee will never be subject to any adverse action by FCC unless it refuses to obey the court order. This serves to encourage licensees not to settle with EEOC and thereby undermines enforcement of Title VII. The relative value of referring civil rights complaints to EEOC is negated by FCC's failure to develop any standardized procedures

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80/ For a discussion of EEOC's activities, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1975 - Employment ch. 3 (in print).

for recognizing the findings of that agency and including them in a coordinated effort to ensure equal employment opportunity. FCC estimated that it received 69 complaints alleging discrimination in employment practices based on race, color, religion, or national origin between July 1, 1972,and May 1, 1973. During the same period, the agency received 56 complaints based on alleged sex discrimination.[81/] Because of the method utilized by FCC to record these complaints,[82/] the agency was unable to determine how many of these were referred to EEOC. Further, FCC has no procedure to check progress on the handling of the referred complaints and, in fact, has not contacted EEOC since the initial referrals.

FCC has no data on how many complaints alleging employment discrimination by licensees it processed.[83/] The majority of these complaints, however, were handled by correspondence. This method of handling complaints usually consists solely of referring the complaint to the involved licensee for comment and subsequently forwarding its response to the complainant.[84/] FCC makes no determination on the

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81/ FCC Response to U.S. Commission on Civil Rights Questionnaire, July 9, 1973 /hereinafter cited as FCC response/.

82/ FCC states that the Broadcast Bureau files complaints concerning any subject matter only under the call letters of the stations and the names of the networks involved. The Bureau does not keep a separate, duplicate file of complaints by subject matter. In order to locate all complaints on employment discrimination by licensee, the Bureau would have to examine, line by line, the daily logs. Id. and Shiben interview, supra note 49.

83/ FCC response, supra note 81.

84/ FCC has indicated that,"If the correspondence between the FCC, the complainant, and the licensee does not appear to resolve the complaint favorably to the licensee, the FCC pursues the matter further, usually by a field inquiry." Wiley letter, supra note 23.

merits of the issue, nor does it utilize the complaints as an indicia of a licensee's lack of compliance with the nondiscrimination prohibitions.[85/]

Five civil rights complaints were the subject of a field investigation in fiscal year 1973.[86/] FCC indicates that complaint investigations are initiated when (1) the complaint indicates a violation and provides sufficient information on which to initiate an investigation and (2) the necessary information cannot be obtained by correspondence.[87/] In three of the cases, FCC found no discrimination, and as of January 1973, it was still considering the other two complaints.

Although complaints can be a valuable tool to identify problem areas in the employment patterns of the broadcast industry, FCC has

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85/ FCC states, however, that:

> The complaint folder on each station is reviewed by the Complaints and Compliance Division before license renewal time, and all complaints based on discrimination or otherwise which appear to raise questions as to the licensee's qualifications for renewal are brought to the attention of the Renewal and Transfer Division, together with correspondence relating to them, field investigation reports, and other pertinent information. Wiley letter, supra note 23.

86/ FCC, as of September 1974, had not allowed this Commission to review the investigative reports of its field investigations of complaints. The agency's stance is directly opposed to that of the Department of Justice and other Federal agencies which have granted full release of materials to this Commission.

87/ FCC response, supra note 81.

initiated few reviews of licensees based upon complaints.[88] In the case of Bob Jones University, however, FCC did eventually respond to a 1970 complaint from this Commission that the stations operated by the licensee utilized discriminatory employment practices and failed to adequately serve local community needs.[89] FCC deferred the stations' license renewals until 1973 when it granted new licenses with several conditions relating to civil rights.[90] The

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88/ In a recent letter to this Commission, FCC stated:

> In fact, the FCC has made field investigations of a number of stations, at least ten of which are in hearing status now on issues which include employment and/or programming discrimination against ethnic minorities. One station, designated for hearing in July 1973, (Station WSRA), elected in January 1974 to turn in its license rather than go through a hearing. In the case of King's Garden v. FCC (Stations KGDN and KBIQ), involving religious discrimination, the Commission found against the licensee, denied reconsideration, and the Commission's Decision has been affirmed in Court. Likewise, the Commission recently heard Oral Arguments on a case of eight Alabama Educational TV stations on issues which included discrimination in employment and programming. Wiley letter, supra note 23.

89/ Letter from Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, to Rosel H. Hyde, Chairman, FCC, Oct. 23, 1969.

90/ The blatantly discriminatory practices of Bob Jones University have instigated several governmental actions: (1) since 1967, the University has been barred from receiving Federal financial assistance from programs administered by the Department of Health, Education, and Welfare, (2) the Veterans Administration has taken action to terminate the University's right to participate in programs, and (3) the Internal Revenue Service has moved to withdraw the tax exemption of the University.

licensee was required to maintain bona fide affirmative recruitment efforts for minority groups and women at sources outside the Bob Jones University, and to submit to FCC, each time it filled a position at the stations until June 1, 1974, [91/] the affirmative action it nad taken to hire a minority for the job.

B. Broadcast Station Licensing and Renewals-- Other Civil Rights Implications

Licenses to operate over the public airwaves are granted by the FCC for 3-year periods. [92/] At the end of each license term, FCC is obligated to make an affirmative determination that renewal for 3 more years will serve the public interest. It bases its judgment on the station's past programming record, on the station's ascertainment study describing the community needs, and on the adequacy of the programs the station proposes. The comments, complaints, and legal objections of public parties must be considered in any decision FCC makes. Private or public groups may challenge the station's right to the license and may compete for it in open

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91/ FCC, Report No. 11650, July 6, 1973.

92/ On May 1, 1974, the House of Representatives passed H.R. 12993, which would extend the renewal term from 3 to 5 years, thus causing the performance of the stations to be scrutinized less frequently. This will have the ultimate effect of reducing the impact of FCC's civil rights program, since it is geared to a large degree on activities conducted at the end of the license renewal period.

hearings at the end of the license period.

FCC renews radio and televison licenses by State or groups of States at 2-month intervals over a 3-year period. A station is required to submit a formal "Application for Renewal" to FCC 120 days before the license renewal date.[93]

FCC has recognized that there are types and areas of service which are essential to meet community needs and interests in broadcasting. It thus set forth criteria for evaluating broadcast service in the public interest. Three of these standards governing programming and employment have significant civil rights implications.

1. Ascertainment of Community Needs

In order to plan what programs a station will produce or carry each year, a broadcaster is required to ascertain the "problems, needs, and interests" of the community the station serves. In a policy statement[94] FCC set forth the general nature of the inquiry and indicated that it should begin with "first, a canvass of the listening public...and second, consultation with leaders in community life."[95] These consultations should include both leaders of community

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93/ FCC, Interim Report and Order, "In the Matter of Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses," Docket No. 19153, May 1, 1973.

94/ FCC, Report and Statement of Policy Re: Commission Network En Banc Programming Inquiry (FCC 60-670): 25 Fed. Reg. 7291 (1960).

95/ FCC, Primer on Ascertainment of Community Problems by Broadcast Applicants-Part I, Section IV-A and IV-B of FCC Application Forms FCC Order 71-176 Docket No. 18774, 36 Feg. Red. 4092, 4094 (1971).

organizations and members of the general public. The prime criterion for these conferences is that the community leaders consulted must represent a true cross section of the community, not just one or two majority interests.

In March 1971, FCC issued a Primer, [96] which provided guidelines for conducting ascertainment surveys and standards for program proposals. The applicant must describe in detail its community, outlining the minority, racial, or ethnic breakdown, the economic and governmental activities, public service organizations, and "any other factors or activities that make the particular community distinctive." On the basis of this overview, leaders are selected to be interviewed. FCC requires no set number of interviews but does warn broadcasters that omitting a significant group would make the ascertainment study defective.

Members of the general public are to be surveyed to identify any community problems which may not have been previously revealed. [97]

96/ Id.

97/ Although the applicant is to base this survey on a "random sample," it is also encouraged to conduct "further consultations with a particular group" to elicit viewpoints that will give it additional insight into the group's problems. Although the applicant can use a research organization to conduct the general public survey and can collect data by asking participants to fill out a questionnaire, it is ultimately responsible for the results.

FCC modified the Primer on January 5, 1972 (33 FCC 2d 394) to allow the use of mailed questionnaires in the ascertainment of community problems among members of the general public. To rely on this method, however, the applicant must "assure that those members of the general public who are consulted are generally distributed throughout the city of license."

The applicant must then list all ascertained community problems and indicate what programming is proposed to meet the problems. A significant proportion[98/] of a station's broadcast time is to be devoted to community problems, but the applicant is given discretion to determine the specific amount. FCC also stresses the need for ongoing community ascertainment and the possible need for programming modifications to meet new community needs.

On May 1, 1973, FCC adopted new license renewal procedures designed to promote closer dialogue between stations and their communities.[99/] The revised renewal procedures alter the ascertainment procedures to be followed by broadcasters. Although television as well as radio licensees are still required to ascertain community needs in accordance with the provisions laid down in the Primer, television licensees will not be required to file a report with FCC; rather they must represent to FCC that they have followed the guidelines in conducting their surveys. The station must also place all material connected with the surveys in its public files.

Further, when listing the community problems identified during ascertainment, FCC no longer expects broadcasters to be comprehensive in their reporting but only requires them to identify typical and

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98/ Primer, supra note 95.

99/ Interim Report, supra note 93.

illustrative programs designed to meet what they determine to be the "significant problems and needs of the service area."[100/] The lists of problems (no more than 10) and programs carried to meet them are to be prepared annually and retained in each station's public files but not submitted to FCC until the station files its renewal application. Television licensees must not only retain such material for 3 years but also separate the comments into programming and nonprogramming files. Radio stations are required to retain "comments and suggestions" for 3 years but are not obligated to categorize them. An annual listing of community needs and the illustrative programs carried by both radio and television broadcasters to meet them are also to be retained in the public files of the stations. Community residents will be allowed to inspect these materials and to comment on them.

FCC is contemplating further changes in the license renewal area and is studying proposals for shorter and simpler procedures for radio licensees. This project is being handled by FCC's Re-Regulation Task Force, which was created in 1973 to analyze each rule, particularly as it applies to radio, and to determine its current validity and whether it should be continued, modified, or deleted.

On March 22, 1973, after a recommendation by the Task Force, FCC

100/ Id.

issued a "Notice of Inquiry" to examine whether the ascertainment process effectively serves the public interest.[101] Public comments were requested on that subject as were recommendations for improvements in the ascertainment process.[102] The assertion that radio is a different medium from television and should be treated differently in the matter of ascertainment is also to be examined.[103]

The question of public participation in program planning is of legitimate civil rights concern, since it affects the entire issue of adequate programming for minorities and women. While the Inquiry will explore the possible modification of the ascertainment process, FCC has offered no alternatives that would require "local broadcasters to provide

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101/ FCC, Notice of Inquiry, "In the Matter of Ascertainment of Community Problems by Broadcast Applicants" (FCC 73-330) Mar. 22, 1973.

102/ In adopting the Primer, which set forth standards for the ascertainment process, FCC indicated that with respect to renewal applicants, the Primer was to serve "as an interim measure until other standards are adopted." FCC Report and Order, Docket No. 18774, 27 FCC 2d 655.

103/ Part I of the Inquiry is designed to explore alleged differences relative to the role of each of the media in discharging its statutory responsibility for serving the public interest, convenience, and necessity. Certain variables, e.g., market size, number of stations, number of employees, specialized formats, will be considered in determining ascertainment procedures.

local programming" should the ascertainment requirement be curtailed. An investigation and evaluation of FCC procedures to relieve broadcasters of unnecessary burdens is obviously of considerable value, but, if what results is a sacrifice of the public interest criteria for broadcasting, it will be a most regrettable situation.[104] The Communications Act requires broadcasters "to serve the public interest," but this will never be accomplished if FCC allows its licensees to further insulate themselves from the public.[105]

2. License Challenges

If a broadcaster does not adequately fulfill its responsibilities, the general public or private groups have a right to demand that the license be revoked and awarded to a licensee who will act in the public interest.[106] The public's right to intervene before FCC was established when the Office of Communication of the United Church of Christ and two black civil rights leaders in Jackson, Mississippi, filed a petition to deny the license renewal of station WLBT-TV on the grounds that the station discriminated against the interests of the black community, which represented 45 percent of its viewers. In 1964, FCC refused the petition on the ground that citizens' groups had no right to legal standing in its procedures. Two years later, in a landmark decision, the United States

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104/In comments on the inquiry, NOW stated that re-regulation and a concomitant change in the ascertainment procedures must not be allowed to detract from station responsibility to the local community. NOW further indicated that re-regulation must not be used as a guise for nonregulation. NOW, Comments, In the Matter of Ascertainment of Community Problems by Broadcast Applicants, Docket No. 19715, June 1973.

105/See FCC, Notice of Inquiry "Dissenting Opinion of Commissioner Nicholas Johnson," Docket No. 19715, Mar. 22, 1973.

106/For further discussion of license renewal challenges, see M. Prowitt, Citizen Action in Radio and Television (May 1971); Citizens Communications Center, Progress Report (May 1, 1971); and R. M. Jennings, Guide to Understanding Broadcast License Applications and Other Forms (November 1972); N. Johnson, How to Talk Back to Your Television Set (1970); FCC, The Public and Broadcasting (Sept. 29, 1972).

Circuit Court of Appeals in the District of Columbia reversed the FCC and granted standing to the public to intervene in the station licensing procedures of FCC. The court ruled that "a broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."[107]

FCC rules provide that, subject to specified procedures, a petition to deny license renewal may be filed against any pending application.[108] The petition is a formal request that FCC refuse the authority being applied for. The most severe penalty FCC can impose is denial of the applicant's license, but it may also levy a fine or authorize only a short term renewal.

107/ The circuit court decided that responsible community organizations have the right to contest the renewal of a license of a station which ignores its public responsibilities. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 995, 1003 (D.C. Cir. 1966). As ordered by the court, FCC held a public hearing in Jackson, Mississippi, in 1967, but ruled in favor of WLBT and against the station's public challengers. In 1969, FCC's ruling was reviewed by the court and overturned. FCC was ordered to vacate the license of WLBT and to accept new applications for the Jackson television channel. Applications for the license were received from five groups, including three with substantial black ownership, but in August 1973 an administrative law judge awarded the license to Dixie National Broadcasting Corporation, which has only 4 percent black ownership and several white principals whose enlightenment on racial issues is questioned. This decision has been appealed by the Office of Communications of the United Church of Christ, the Community Coalition for Better Broadcasting, and the Lawyers' Committee for Civil Rights Under Law. The position of these organizations is that in awarding broadcast licenses the Commission must take into account both the degree of minority participation and the racial attitudes of a potential licensee's principals. See material on minority entrepreneurship, at Section IIC infra.

108/ The new FCC license renewal procedures require radio and television stations to broadcast announcements every 15 days throughout their license period describing their public service obligations and inviting comments and suggestions. During the 5 months preceding the deadline for filing petitions and competing applications, the announcements must note that the application is to be or has been filed and that the public may inspect a copy and submit comments to FCC. FCC response, supra note 81.

A petition to deny must first establish that the petitioner is a "party of interest." 109/ It must then set out the "allegations of fact," the specified station practices that are asserted not to be in the public interest. These allegations must be accompanied by specific supporting statements and thorough documentation.

Petitions to deny license renewal must be filed on or before the last month of the expiring license term. 110/ To publicize the times of license renewals, applicants, in cities with a daily newspaper, must publish notices "at least twice a week for two consecutive weeks within the three-week period immediately following the tendering for filing of such application." 111/

A petition to deny may be set for hearing if FCC decides that substantial public interest questions have been raised about a broadcaster. FCC, however,

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109/ Under the WLBT decision, a broadly-based community group qualifies as a party of interest.

110/ Petitions to deny such actions as a license transfer must be filed within 30 days after FCC announces the acceptance of the application. In applications to construct new stations or to assign or transfer licenses, FCC announces in a "Public Notice" the acceptance of the application. Acceptance usually comes a few weeks after filing.

111/ If the application seeks modification, assignment, or transfer of an operating broadcast station, or is an amendment or an application for renewal of a broadcast station license, the applicant, shall, in addition to publishing a notice of such filing, broadcast a notice over the station at least once daily on 4 days in the second week immediately following the tendering for the filing of such application.

has designated for hearing only a few petitions to deny which were based on civil rights grounds.[112/] In fact, it has been asserted that FCC treats a hearing as if it were a conviction. Although the Communications Act places the burden of proof of offering adequate service on the licensee, it is felt that FCC shifts the burden to the community group.[113/] Yet, unless a petition to deny is set for hearing, challenging groups have no access to the comprehensive data on a licensee needed to determine the underlying reasons for disparities in employment and programming.[114/]

112/ Two petitions containing employment discrimination allegations have been scheduled by FCC for hearing. The Alabama Educational Television Commission's eight television stations were designated for hearing in 1970; the hearing was finally conducted in September 1974. Stations WLEF-AM and WSWG-FM, licensed to LeFlore Broadcasting Co., Greenwood, Mississippi, were designated for hearing in April 1974.

113/ Lloyd interview, supra note 42, Soto interview, supra note 41, and Schwartzman interview, supra note 24. The majority of petitions to deny license renewal containing civil rights allegations deal with employment discrimination. The major foundation for these petitions is usually a disparity between a licensee's minority or female work force and the representation of these groups in the local population. Shiben interview, supra note 49. In refusing to set a petition for hearing on this point, FCC relies on a Federal appeals court ruling, Chuck Stone v. FCC, which held that in certain cases statistics alone without citation of specific instances of discrimination, were not sufficient to prove discrimination. The court also indicated that statistical comparisons of minority employment with population figures must be beyond a "zone of reasonableness" for a prima facie showing of discrimination. The television station whose employment patterns were the subject of this suit, for example, had a 7 percent black work force in a metropolitan area that was over 24 percent black. The court ruled that this was within the "zone of reasonableness." 466 F.2d 316, 332 (D.C. Cir. 1972). See also Bilingual Bicultural Coalition of Mass Media, Inc., v. FCC, 942 F.2d 656 (D.C. Cir. 1974).

114/ A Federal appeals court stated in Bilingual Bicultural Coalition of Mass Media, Inc., v. FCC, that FCC "must consider how best to provide a fair and reasonable opportunity for those challenging license renewals to seek explanations for the underemployment of minority groups." The court indicated that the development of a mechanism to provide such information was within FCC's discretion. In the absence of such a mechanism, however, the court suggested that "hearings may have to be required...in order to provide the tools of discovery." 492 F.2d 656, 659 (D.C. Cir. 1974).

Since July 1972, FCC received approximately 39 petitions to deny the license renewal applications of 98 stations.[115/] Charges of employment discrimination were filed against 86 stations.[116/] Allegations of both employment and programming discrimination were made against 17 stations and four charges concerned solely programming. All but eight of the petitions are still pending before FCC. These eight petitions were withdrawn by the complainants.

The threat of a license renewal challenge based on civil rights violations has been used by citizens' groups to demand broadcasters cease discriminatory activities. In the last 4 years community groups have negotiated agreements with broadcasters in a number of locations such as Atlanta, Georgia, and San Antonio, Texas. Citizens groups have also monitored performance of stations to ensure that they live up to the terms of the agreements and have been successful in encouraging broadcasters to file amendments to their renewal applications.

Transfers have also proven to be an effective regulatory procedure available to citizen participation. Many significant agreements, which have been reached between broadcasters and minority groups and women, have occurred in the transfer

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115/ Complainants include community groups such as the National Organization for Women, Columbia, S.C.; Community Coalition for Media Change, Philadelphia, Pa.; Ad Hoc Coalition on Broadcasting, New York, N.Y.; Aligned Citizens United for Television Equality and the Media Task Force, Washington, D.C.; Illinois Citizens Committee for Broadcasting, Chicago, Ill.

116/ Some groups have filed market-wide petitions to deny license renewal against all the stations in a given city. These petitions are sometimes called "Petition to Prevent Continued Violation of the Equal Employment Opportunity Regulations," and they serve as a specialized kind of petition to deny. They are based on the actual experiences of the people in the community, are verified by affidavit, supported by statistical evidence, and show a pattern of discrimination in employment among the entire industry over a period of years. Such petitions have been filed in Rochester, N.Y., Washington, D.C., Richmond, Va., and Philadelphia, Pa. This form of petition is significant because it points up the fact that employment discrimination in a specific area is not limited to a single broadcaster, but, in fact, pervades the entire industry.

rather than the renewal context. The reason for this is that when a broadcaster wants to sell a station to another party, they prepare an agreement which usually includes a deadline, beyond which the agreement is void. Once the agreement is signed, both parties become eager to see their transfer move through the Commission's various bureaus with no regulatory hitch which would drag beyond the deadline. If a citizen group intervenes in the Commission's procedures, the broadcasters become nervous and very anxious to negotiate. Thus, Capital Cities, McGraw-Hill, Storer, Heftal,and other broadcasting companies have made agreements with minorities and women that have included promises for responsive programming and affirmative action programs. 117/

3. Programming Complaints

In fiscal year 1973, FCC received 70 individual complaints alleging discrimination because of inadequate minority or female programming. Since

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117/ See for example, letter to Mr. Vincent J. Mullins, Secretary, FCC, from Warren C. Zwicky, Vice President and Washington Counsel, Storer Broadcasting Company, May 20, 1974. This letter relates to an agreement reached between Storer Broadcasting Company, National Organization for Women, and Ethnic Community Coalition to improve employment opportunities and programming for minorities and women offered by Station KCST in San Diego, California. See also, Agreement between McGraw-Hill, Inc., and Colorado Citizens Committee for Broadcasting, Chicano Federation of San Diego County, Inc., Community Service Organization, Inc., Colorado Committee on Mass Media and the Spanish Surnamed, Inc., and Leonard P. Jackson, et al., May 6, 1972. This agreement pertained to television stations KERO-TV, Barkerfield, KOGO-TV, San Diego, KLZ-TV, Denver, and WFBM-TV, Indianapolis.

the only breakdown FCC makes in this category is to list separately the programming complaints filed on behalf of blacks (26), it is impossible to determine how many of the other programming discrimination complaints (44)[118] were filed by members of other minority groups or women. FCC indicates that extremely few of the complaints were the subject of a field investigation because the adequacy of programming for minority groups usually arises in connection with the application for renewal or assignment of licenses.[119] If such applications are pending, the Compliants and Compliance Division forwards the complaints to the Renewal and Transfer Division for consideration in connection with the applications. However, if no such application is pending and FCC's review indicates the presence of substantial questions as to the licensee's compliance with its prior representation on service for minority groups, the case will go directly to FCC. Station WSWG, Greenwood, Mississippi, for

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118/ FCC response, supra note 81. A recent newspaper story demonstrated the serious lack of responsiveness by television stations to the concerns of blacks. For example, it noted that only three of the 1,500 items on the CBS Evening News in the first 19 weeks of 1974 dealt with blacks and politics. Further, only 19 of the approximately 400 to 500 guests on NBC's "Today Show" during the same period were black. J. Dreyfuss, "Blacks and Television: Television Controversy: Covering the Black Experience," The Washington Post, Sept. 1, 1974, K1, 5, col. 1.

119/ Id., and Wiley letter, supra note 23.

example, was directed on July 25, 1972, to file a renewal application within 3 months so that FCC could determine much sooner than the expiration of the regular license period whether to designate the renewal applications for hearing on issues centering around alleged failure to implement prior representations as to program service to the black community and discrimination against blacks in employment practices.

In fiscal year 1973, FCC also received a number of complaints concerning discriminatory programming content. FCC states that, since it is prohibited by statute from exercising censorship over any program material, it normally does not make investigations into allegations of religious, racial, ethnic, or sex criticism, ridicule, or humor, [120/] except within the framework of the fairness doctrine.[121/]

120/ Most of the complaints received under these categories are against such things as Polish jokes, references linking the Mafia with persons of Italian descent, jokes about Jews, Catholics, Mormons, Methodists, and Baptists. FCC receives many complaints from persons who either do not grasp or do not approve of the humor in a program such as "All in the Family." Complaints are also received of antisemitic or antiblack remarks which are not made in the context of satire or humor. Id.

121/ FCC has held that when a station presents one viewpoint on a controversial public issue, the public interest requires that reasonable opportunity be afforded for the presentation of opposing viewpoints. This is the "Fairness Doctrine." It stems from a policy on editorializing announced in 1949, supported by a 1959 amendment to the Communications Act, which obligates broadcasters "to afford reasonable opportunity for the discussion of conflicting views of public importance." In 1967, FCC adopted specific rules requiring stations to notify persons when personal attacks were made on them in discussion of controversial public issues (with certain exceptions such as newscasts). The same requirements were also applied to station editorials endorsing or opposing a political candidate. These rules were upheld by the Supreme Court in 1969.

Although the fairness doctrine may be involved in some such complaints and if so is applied by the staff, FCC's basic policy in this area was set forth as follows in its ruling of June 17, 1966, on a complaint by the Anti-Defamation League of B'nai B'rith against radio station KTYM, alleging antisemitic statements by a news comentator:

> It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568; Ashton v. Kentucky, [384 US 195], 34 LW 4398 (1966). This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even highly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech it must be free for speech that we abhor and hate as well as for speech that we find tolerable or cogenial. 122/

122/ FCC Response to U.S. Commission on Civil Rights Questionnaire, Aug. 9, 1972.

C. Minority Entrepreneurship

In 1973, there were over 7,000 radio stations and 1,000 television stations operating in the United States. Of these, only 33 radio stations located in 20 States and the District of Columbia and no television stations were owned by minority group members.[123] The lack of sufficient capital investment is not the only reason minorities are not better represented in the industry.

The establishment or operation of a radio or television station does not require enormous capital investment for equipment and personnel expenses.[124] Yet the cost of purchasing such a station can be prohibitively high because most of the purchase price is attributable to the value placed on the license granted by FCC. Most available frequencies have already been assigned and, therefore, a minority applicant would be required to engage in a competitive proceeding to seek award of a license. FCC's rulings, however, tend to block new competition for licenses and preserve the status quo, thus continuing the exclusion of minority groups from ownership of communications media outlets.

In 1965, FCC issued a Policy Statement on Comparative Broadcast Hearings[125] which established guidelines to be considered in

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123/ Telephone interview with Chester A. Higgins, Special Assistant to Commissioner Hooks, FCC, Nov. 19, 1973.

124/ The administrative costs of establishing and operating a radio or television station, i.e., salaries, production costs, and equipment, vary and range from $100,000 - $400,000 a year. Federal assistance and other funding sources are, however, available for minority economic development.

125/ 1965 Policy Statement on Comparative Hearings, 1 FCC 2d 393 (1965).

differentiating among several applicants for a license.[126] In 1969, for the first time in FCC's history, the agency denied the renewal of a temporary operating authority permit of an existing television station and granted the license to a competing applicant.[127] FCC issued a new policy statement in 1970 declaring that it would not entertain license challenges against radio and television stations which "substantially" meet the programming needs of their communities.[128] The new policy statement, however, was set aside by a Federal circuit court of appeals ruling which ordered FCC to treat both existing licensees and challengers on an equal basis.[129] The court, cognizant that maintaining the status quo would forever exclude minorities, noted that "as new interest groups and hitherto silent minorities emerge in our society they should be given more stake in and chance to broadcast on our radio and television frequencies."[130]

FCC's guidelines, therefore, on competing applications remain those specified in the 1965 Policy Statement, though congressional action has been proposed in this area.[131] Even under these more liberal standards,

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126/ The Policy Statement instructs that such matters as (1) full-time participation in station operation by owners, (2) proposed program service, (3) past broadcast record, (4) efficient use of the frequency, and (5) character should be considered. Id. at 395, 397, 398, 399.

127/ WHDH-TV, 16 FCC 2d 1 (1969).

128/ Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 (1970).

129/ Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

130/ Id. at 1213, n. 36.

131/ A number of bills before the Senate in June 1974 included a "two-step" procedure for dealing with competing applicants. Rather than being guaranteed a hearing on their applications, in which, as is currently the case, they can match their proposals against the performance of the incumbent broadcasters, the challengers would first have to prove that the incumbent had been seriously negligent in the operation of the station. This is, of course, almost impossible to prove. The incumbent, in other words, would have to have performed badly enough for the FCC to take away his or her license on its own, which it only does in cases of serious crime or gross misconduct. Thus, no matter how much better the challenger's service would be than the incumbent's, even the most mediocre incumbent would be insulated from the challenge.

however, FCC has refused to encourage or facilitate minority participation in ownership of radio and television stations. In a competitive proceeding for a television license in Orlando, Florida involving eight applicants, FCC refused to give credit to one applicant for having substantial black ownership.[132] This position was overruled by the Federal circuit court of appeals in TV 9, Inc. v. FCC on November 6, 1973.[133] The court stated that the minority group stock ownership of an applicant serving a multiracial area is a relevant consideration to a choice among applicants. Further, the court indicated that it did not:

> ..,accept the Commission's position based either on the Policy Statement or lack of advance assurance of superior community service attributable to such Black ownership and participation.... Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors. [134]

FCC is currently appealing the ruling to the Supreme Court.[135] If the decision is upheld, FCC will be forced to give consideration to minority applicants for licenses in competitive proceedings, a policy which is both long overdue and greatly in the public interest.

132/ Mid-Florida Television Corp., 33 FCC 2d 1, 22 (1972). The hearing examiner's decision was affirmed by FCC's Review Board. The Commission refused to hear arguments opposing the Review Board decision, 37 FCC 2d 559 (1972).

133/ TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973).

134/ Id. at 938.

135/ In a recent letter to this Commission, FCC stated:

> It is our position that the Communications Act, is and must be, color blind. As we said in the challenged decision, "Black ownership cannot and should not be an independent comparative factor." To hold otherwise, we believe, would constitute reverse discrimination of of a sort that is contrary to the Civil Rights Act. Wiley letter, supra note 23.

D. Other Civil Rights Activities

In March 1973, FCC began an innovative and useful program of holding a series of meetings to allow representatives of minority, female, and industry groups to present informally their views concerning problems in the broadcast field. The meetings provided FCC with an opportunity to gain insight into the positions and experiences of community groups involved in broadcasting. This interaction was an impetus to the agency's current efforts to improve its civil rights compliance program.[136/]

The agency's first discussion was held with a coalition of over 40 black organizations involved with the media and focused on programming and employment issues.[137/] FCC subsequently scheduled similar meetings at 3 month intervals and met with, among others, the National Organization for Women and the National Latino Media Coalition.[138/] In November 1973, a new national citizens group concerned about local broadcast service and cable television, the National Black Coalition, met with FCC for 3

136/ Another important form of activity which has furthered FCC's equal opportunity program has been the speeches presented to industry groups on civil rights by Commissioners such as Benjamin L. Hooks and Dean Burch.

137/ The initial meeting was organized by Black Efforts for Soul in Television and the Citizens Communications Center. The participants complained that the agency's equal employment rules had little impact thus far on the industry and that programming for minorities was totally inadequate. They further charged that FCC's efforts to handle complaints, petitions to deny license renewal, and fairness doctrine issues are not adequate. Interview with William Wright, Director, Black Efforts for Soul in Television, May 5, 1973.

138/ The National Latino Media Coalition, representing 10 States and the District of Columbia, met with FCC on May 17, 1973, and recommended that the agency appoint a task force composed of Coalition members and FCC staff members to pursue the establishment of permanent lines of communication between the two organizations. Among other recommendations of the Coalition were the appointment of a Latino Commissioner and the establishment of an independent, ongoing program unconnected with license renewal procedure to encourage employment of Latinos in the broadcast industry. Interview with Richard Beserra, Director, National Latino Media Coalition, June 20, 1973.

hours.[139] The group, with representatives from 20 cities in attendance, presented FCC with a petition for rulemaking asking for decentralization of the agency's operation, strengthening of FCC's internal and external equal employment policies and rules, and requiring prime time, minority-oriented programming in areas with substantial minority group populations.[140]

FCC has indicated that it will continue to hold the discussions in the future, although they are labeled experimental.[141] The agency, further, has begun to conduct regional meetings across the country to further open communications with local public interest and citizens groups. The first such meeting was held in Atlanta, Georgia, in May 1974, with Chairman Richard E. Wiley and Commissioner Benjamin L. Hooks in attendance.

139/ The National Black Media Coalition has a membership of more than 40 local and regional organizations located in more than 30 communities. The dissolution of Black Efforts for Soul in Television leaves this coalition as the only group with national representation of blacks concerned with broadcasting.

140/ National Black Media Coalition, Petition for Rulemaking and Notice of Inquiry, Nov. 17, 1973.

141/ FCC has indicated that as more expertise is gained, the agency may revise this approach, either in minor or major ways, or end it entirely. FCC, Release No. 99507, Mar. 30, 1973.

III. Common Carriers

A. Responsibilities

Communications common carriers provide electronic communications services such as telephone, telegraph,and telephoto. Both interstate and foreign communication services of these carriers are regulated by FCC.[142/] At the end of 1971, FCC listed 80 telephone carriers fully subject

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142/ Intrastate communications are not subject to FCC jurisdiction but come under the authority of State utility commissions. The Communications Act of 1934 assigned to FCC regulatory powers over common carrier wire and radio communication that had formerly been exercised by various Federal agencies and broadened considerably the scope of such regulation. A major purpose of this statute is to make available to all the people a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges.

The Communications Satellite Act of 1962 provided for the establishment, in cooperation with other countries, of a commercial communications satellite system as part of an improved global communications network. The United States' participation in this system is through the Communications Satellite System (Comsat), a private corporate entity organized under this act and subject to governmental regulation. Comsat is subject to the same regulatory controls by FCC as are other communications common carriers.

to its jurisdiction,[143] including 60 with annual revenues of $1 million or more.[144] These 60 companies had operating revenues of $19.9 billion in 1971 and had over 845,000 employees. They reported a total of 109 million telephones in service and handled more than 200 billion telephone calls in 1971. FCC's jurisdiction also includes the only domestic telegraph carrier, Western Union, and five overseas telegraph carriers with total revenues of over $425 million and 28,000 employees.[145]

Common carriers are required to furnish service on request and at reasonable rates; file their rates with FCC for review and regulation; and show that all charges, practices and regulations are just and reasonable. FCC approval is required before a carrier may construct, acquire,or operate facilities. Further, mergers, consolidations, and acquisitions of property of one carrier by another must be approved by FCC.

143/ The Communications Act recognized two types of common carriers, those fully subject to the act and those only partially so. The latter do not engage in interstate or foreign communication except through connection with the wire, cable, or radio facilities of nonaffliated carriers. They are exempt from certain provisions of the act which apply to fully subject carriers.

144/ The 60 companies account for almost 90 percent of the telephone industry revenues. FCC, 38th Annual Report 258 (1973).

145/ Id.

On August 5, 1970, FCC adopted regulations designed to ensure nondiscriminatory employment practices among those common carriers subject to its jurisdiction.[146] To implement the regulations, FCC requires common carriers with more than 16 employees to file annually an equal employment program indicating the specific practices in such areas as recruitment, selection, and promotion, which they will follow in order to assure equal employment opportunity. Each carrier is also required to submit an annual employment report listing the total number of employees by job category, sex, race, and ethnicity. In addition to these provisions, every carrier, regardless of size, must report annually to FCC on all complaints of discrimination in employment that have been filed against it during the preceeding calendar year.[147] The

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146/ The regulations require that equal opportunity in employment be afforded by all common carriers, licensees or permittees, to all qualified persons, and no personnel shall be discriminated against in employment because of sex, race, color, religion, or national origin. 47 C.F.R. § 21.307.

147/ The rules provide that complaints of discrimination made to the FCC against a carrier shall be submitted to the EEOC if the involved company is subject to Title VII of the Civil Rights Act of 1964 or to an appropriate State agency. Complaints against a carrier within the FCC jurisdiction and not within that of a Federal or State agency shall be accorded appropriate treatment by the FCC. The FCC is also required to investigate complaints indicating a "pattern" of discriminatory employment practices in violation of its rules.

annual reports on employment and discrimination complaints are due on May 31 of each year.

B. Compliance Mechanisms

FCC's program to assure nondiscrimination in employment by common carriers is based primarily on the review of annual employment reports and equal employment opportunity programs. Another important FCC activity relates to the monitoring of the agreement which emanated from EEOC's complaint against American Telephone and Telegraph Company (AT&T). The utilization of this mechanism has far-reaching potential, since AT&T accounts for over 95 percent of the employees in the industry and is the world's largest nongovernmental employer.

1. AT&T Complaint

On November 19, 1970, AT&T filed revised rates with FCC calling for a nine percent increase in long distance telephone rates. On December 10, 1970, EEOC filed a petition to intervene and to suspend the increase alleging that the Bell System Companies[148/] were engaged in "pervasive, system-wide discrimination against women, Negroes, Spanish surnamed Americans, and other minorities."[149/] EEOC also charged that employment discrimination led to high turnover and other inefficiencies which

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148/ The "Bell System" refers to AT&T and its 24 subsidiary, operating companies such as New York Telephone or New Jersey Bell.

149/ EEOC, Motion to Intervene, Dec. 10, 1970. Specifically, the petition alleged that the Bell System was in violation of Section 21.307 and 23.49 of FCC Rules, various sections of the Communications Act of 1934, as amended, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1886, the Equal Pay Act of 1963, Executive Order 11246, and rules of various cities and States.

resulted in higher charges for consumers and were thus not in the public interest.[150] On January 21, 1971, FCC agreed to establish two proceedings, one to consider the question of employment discrimination and the other to inquire into the fairness of the proposed rate increase.[151] In its proceeding concerning discrimination in employment, FCC decided to analyze the potential effect of AT&T's employment practices on the revenues, practices, and rates of AT&T.[152] It also decided to defer action on the rate inquiry until allegations regarding discriminatory employment practices could be resolved.[153] EEOC and the staff of FCC's Common Carrier Bureau prepared written testimony after requesting massive employment

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150/ In 1970, EEOC did not have the authority to initiate legal action against employers for discriminatory employment practices. Such action was authorized in the Equal Employment Opportunity Act of 1972.

151/ Docket No. 19129 was instituted for the purpose of investigating rates (FCC 71-74) and Docket No. 19143 was created for the purpose of inquiring into the allegations of discriminatory employment practices particularly in the light of FCC's own regulations (24 FCC 2d 725).

152/ One of the specific issues designated in Docket No. 19143 for investigation was:

> Whether, and in what manner, any of the employment practices of AT&T, if found to be discriminatory, affect the revenues or expenses the rates charged by that company for its interstate and foreign communication services, and if so, in what ways this is reflected in the present rate structure?

153/ In its Designation Order in Docket No. 19129, FCC stated as to this proceeding, in part,

> ...Pending a final resolution of this separate proceeding, we will retain jurisdiction of the instant case until such time as the employment discrimination issue and its relationship, if any, to revenue requirements has been resolved....

data from AT&T,[154] and presented it to the Commission on December 1, 1971. The testimony ran 5,000 pages with 25,000 pages of backup documentation which EEOC alleged showed that the Bell System underutilized minorities throughout the system and failed to promote women into higher-paying craft and managerial jobs.[155]

Over a period of 6 months starting on January 31, 1972, FCC held sporadic hearings during which employees and community groups set forth their grievances[156] against the AT&T companies. From October 30 through December 15, 1972, an additional 24 days of hearings were held during which AT&T began to present its case.

In December 1972, while cross-examination of Bell System witnesses was taking place, informal negotiating sessions between EEOC, the Department of Labor, and AT&T, which had been going on simultaneously throughout the hearing, were successful. These negotiations resulted in an agreement between the parties in which AT&T, without admitting to job discrimination, agreed to certain revised employment goals, transfer opportunities, advancement for female and minority employees, and retroactive and prospective pay adjustments. Under the agreement 1,500 female college graduates, who held managerial jobs between

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154/ AT&T produced 100,000 pages of documents and statistics on 375,000 employees in the Nation's largest cities. It claimed that the data showed that it did not discriminate against its minority and female workers.

155/ The EEOC complaint charged that the entire structure of AT&T's employment policies was designed to direct women into some jobs and men into others. For example, 97 percent of the employees in the Bell System traffic departments (where operators work) were female.

156/ Hearings were held for 3 days in Los Angeles, 2 days in San Francisco, 5 days in New York, and 3 days in Washington, D. C.

1965 and 1971 but were, according to the complaint, kept out of rapid advancement training programs--were to receive $850,000; 500 "switchroom" helpers were to get $500,000; and 3,000 women currently in craft jobs were to receive up to $10,000 each.[157/] The agreement also included the unique feature of "delayed restitution" to compensate women and minority group members who never sought promotions because they thought company policies barred them.[158/] AT&T, in addition, stated that women and minority group employees could compete for entry-level craft jobs on the basis of their length of service in the Bell System rather than their seniority on their particular job.[159/] To make sure the changes in seniority

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157/ The settlement is expected to total $15 million in back pay and another $35 million in pay adjustments over a period of 5 years.

158/ The fourth group, consisting of women who had been consigned to female jobs by company policy, received symbolic compensation, since there was no method of determining how many individuals had been affected. Accordingly, the first 10,000 women or minority group members who transfer into crafts jobs and hold those jobs for at least 6 months would get a lump-sum payment of between $100 and $400 to compensate them for the delay in transferring.

159/ This provision was designed to overcome any lingering effect of past discrimination since previously Bell System promotions were based on seniority in the job immediately below the opening. A new pay plan also provided that employees who are promoted will have their new rate of pay determined mainly by their length of service with the company rather than by their salary at the time of promotion, the traditional determinant.

and promotions have their intended effects, the Bell System also agreed to develop an elaborate system of goals and timetables for the employment of women and minority group workers at most levels and areas of the System.[160] Goals of this type are standard in many affirmative action plans, but the Bell System agreement is unique in providing goals for males. They are expected ultimately to compose 10 percent of all operators hired and 25 percent of all clerical workers.

Concurrently with the announcement of the AT&T settlement, EEOC requested FCC to terminate the proceedings and to dismiss its initial complaint. FCC concurred in the request but stipulated that its further examination into the employment and related practices of the Bell System was not precluded.[161] Under the terms of the settlement, AT&T is required to file progress reports on compliance with the agreement with EEOC and the Department of Justice. These reports are to be made available to the company's employees. In July 1973, however, FCC indicated to AT&T that it wanted a copy of all data to faciliate its monitoring program.[162]

160/ The plan divides the country into 700 geographical areas, and each will have its own goals tailored to local population differences; for example, more Mexican American employees will be hired in Texas than in Maine.

161/ FCC, Memorandum Opinion and Order, Docket No. 19143, Apr. 9, 1973.

162/ Interview with Jim Juntilla, Chief, Hearing and Legal Division, Common Carrier Bureau, FCC, July 20, 1973.

The scope and significance of the AT&T settlement is substantial in terms of the size of the back pay award and its coverage of all affected groups. The successful resolution of the complaint would not have been possible without FCC, since it provided an avenue for EEOC to challenge the systemwide discrimination in employment at AT&T.

2. Equal Employment Opportunity Programs

The Hearing and Legal Division of the Common Carrier Bureau is responsible for reviewing the equal employment opportunity programs developed by common carriers. The evaluation of the programs, however, has been delayed because of the Common Carrier Bureau's involvement in the AT&T case.

FCC officials state that a significant portion of their enforcement program will be on the Bell System, rather than the smaller licensees, because of the size of its work force and the number of job opportunities involved.[163/] A few of the bigger licensees, i.e., Western Union and General Telephone, will also receive attention.

163/ Id. It is FCC's opinion that this will be more productive than expending equal or greater efforts on several smaller companies.

As of March 26, 1974, the Division was engaged in designing guidelines for the evaluation of the programs.[164] The AT&T settlement will serve as a basis for the guidelines. Further, FCC will rely heavily on a critique of the Bell System programs done by a consultant for the Common Carrier Bureau.[165] This evaluation found that it was impossible to determine meaningfully AT&T's problems with respect to discrimination because of the absence of adequate equal employment opportunity plans, i.e., in-depth analysis of problems and processes developed to cope with the problems.[166] Most of the AT&T programs set out actions which could be expected to provide improvement in the utilization of minorities and females. Only one of the programs, however, contained an analysis of the work force and had goals for hiring minority and female employees as well as for upgrading present employees.[167] In the absence of clearly defined goals and in-depth

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164/ Interview with Jim Juntilla, Chief, and Giovanna Longo, Staff Attorney, Hearing and Legal Division, Common Carrier Bureau, FCC, Mar. 26, 1974.

165/ Robert Nathan, an expert on economics and communications, was retained in 1971 by FCC to analyze the affirmative action programs of the 25 components of the Bell System and to indicate how these programs can be made effective to carry out the System's declared intention of complying with the equal opportunity laws and regulations.

166/ For example, of the 25 equal employment opportunity programs submitted by the Bell System, only one treated statistically the progress of the company in minority employment and contained an analysis of its work force by minority and nonminority categories, job classifications and sex. Testimony of Robert R. Nathan Before FCC, Docket No. 19143, Dec. 1, 1971.

167/ Twelve of the programs omitted any reference to goals. Eight indicated that the goals were to be established in the future. Five contained quantified goals which were deficient in some respects, generally the lack of any connection with demographic data and company performance. Id.

analysis, there is no way to determine the equal opportunity problems to which the actions are addressed or what their impact might be. It was recommended by the consultant that FCC instruct the Bell System companies to revise the programs and to improve their planning and reporting procedures. Further, the evaluation suggested that FCC amend its requirements for equal employment opportunity programs to meet the more stringent policy established by Revised Order No. 4.[168/]

The Hearing and Legal Division has indicated that it will propose guidelines for equal employment opportunity programs based upon the study's recommendations.[169/] In particular, the concept of goals and timetables will be included as a tool to measure elimination of discriminatory barriers to employment. It is anticipated that proposals will be sent to the Commission in mid-1974.

3. Annual Employment Report

The annual employment reports have been required since 1971.[170/] The reports are reviewed by the Hearing and Legal Division. As opposed to

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168/ Revised Order No. 4, which was issued by the Office of Federal Contract Compliance of the Department of Labor in 1971, established the criteria for the affirmative action plans for the hiring and upgrading of minorities and women required of all Federal nonconstruction contractors.

169/ Juntilla interview, supra note 162.

170/ Form 395 is used by all FCC licensees to report on compliance with the nondiscrimination regulations. For a discussion of this form, see Section IIA2a, supra. In 1973, 50 delinquency letters were sent to carriers who had not filed their reports. FCC response, supra note 81.

the restrictive criteria utilized by the Broadcast Bureau to evaluate the annual reports submitted by broadcasters,[171] the Common Carrier Bureau has adopted the settlement agreement between EEOC and AT&T as the measure of underutilization of minorities and women in the Bell System.[172] However, since the complaint was resolved without a binding judicial or administrative decision, it is felt that the criteria established in the AT&T matter are not controlling with regard to other common carriers.[173] Thus, the Hearing and Legal Division is formulating similar measures of underutilization which will apply to the rest of the telephone and telegraph industry.

The Division conducted a random sample comparison of the data submitted on the annual reports in 1971 and 1972 by common carrier licensees other than the Bell System.[174] The study computed the percentages of minority and women employees in all categories. The employment profiles of the companies generally indicated a growth in the number of minorities and women employed.

171/ For a discussion of the criteria used by the Broadcast Bureau to evaluate the reports submitted by broadcast licensees, see pp. 17-27 supra.

172/ FCC response, supra note 81.

173/ Juntilla interview, supra note 162.

174/ FCC response, supra note 81.

The Common Carrier Bureau proposed to FCC in mid-1973 that the annual report be amended to allow for smaller reporting units, i.e., for each facility, so that demographic and job market comparisons can more readily be utilized. In addition, it was recommended that the table of job categories in the form be expanded to show the median annual pay rate for each of the job categories. This information should reveal if minority or female employees are utilized largely in lower-paying occupations within the same broad job category. FCC had not taken action on these proposals by May 1, 1974.[175/]

The Common Carrier Bureau has not computerized the data filed by licensees on the annual report form.[176/] The Bureau indicates that the enormous amount of computerized material prepared for the AT&T case precludes the necessity for any compilation of employment data on AT&T by FCC and that since AT&T represents the great bulk of common carrier employees there is no present need to act on the other reports. The employment reports are presently filed by the States in which the companies' headquarters units are located.

175/ Juntilla telephone interview, supra note 162.

176/ FCC response, supra note 81.

4. Complaint Handling

In fiscal year 1973, the Common Carrier Bureau received 12 complaints alleging employment discrimination.[177] All of the complaints were sent to EEOC for handling. The Bureau has not taken any action on these complaints subsequent to referral; e.g., it has not requested periodic reports from EEOC on the status of the complaints. In addition to the formal complaints, the Common Carrier Bureau received several letters alleging the general existence of discrimination in the Bell System which did not express any particulars. These letters were answered by informing the complainant of the pendency of the AT&T case.

The Hearing and Legal Division indicates that it will not emphasize the resolution of individual complaints but rather will focus on those that indicate a broad pattern of discrimination.[178] None of the complaints received in 1973 alleged a pattern or practice of discrimination.[179]

177/ FCC response, supra note 81.

178/ Juntilla interview, supra note 162.

179/ Id.

IV. Cable Television

A. Responsibilities

Cable television is a system for bringing television pictures directly to the television set over a shielded wire instead of through the air via an antenna and of providing a large number of additional channels. Cable was developed initially in the late 1940s in communities unable to get television reception because of terrain or distance from television stations. Master antennas were built to pick up broadcast station signals and feed them by cable to subscribers for a fee, and thus came the term "Community Antenna Television" (CATV).

In 1950, there were only 70 cable television operations in the country serving 14,000 subscribers.[180] At the close of fiscal year 1972, there were more than 2,800 cable systems serving well over five million homes in some 5,300 communities.[181] Within the next 10 years, cable penetration

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180/ FCC, Information Bulletin-Cable Television, October 1972. The average system has 2,000 subscribers. The largest one is in San Diego and has over 51,000. Some have fewer than 100. Most systems offer between 6 and 12 channels; the average for all is 10.4. Cable television systems are capable of offering up to 60 different channels.

181/ Cable serves only 7 percent of the country's total population and only 1.6 percent of the television homes in major metropolitan areas. Only 350 of the existing systems have more than 3,500 subscribers. The rural preponderance in cable facilities is due to the fact that the cost of laying cable ranges from $4,000 per mile in rural areas to more than $50,000 in large cities. Id.

is expected to reach about 70 percent of the total television homes and to produce industry revenues of $4.4 billion.[182/]

In 1962, FCC asserted limited jurisdiction over cable television and in 1966, it established interim rules for all cable systems which restricted their ability to expand.[183/] After public hearings and submission of proposals to Congress, FCC adopted new comprehensive rules for cable television in February 1972. Provisions of the rules covered authorized signals, public access channels, authorized procedures for cable systems, and various technical standards.[184/]

In the 1972 cable rules, FCC continued to exercise only limited jurisdiction over cable systems allowing local authorities the most comprehensive control. The first step in setting up a cable system is to obtain a

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182/ One reason for these optimistic projections is that, in addition to the 2,500 operating systems, another 2,300 cable franchises have been granted by local communities and an additional 2,600 applications are pending. C. Tate, Cable Television in the Cities 11 (March 1972).

183/ It is contended that FCC adopted the rules after pressure from over-the-air broadcasters who feared that cable systems in metropolitan areas would result in losses of their audiences. Price and Wicklein, Cable Television: A Guide for Citizen Action 15 (1972).

184/ The rules also provided for State and local regulation of cable by establishing franchise areas, control over size of operation, and quality and type of service. However, FCC indicated that local authorities must make provisions to bring cable benefits to all areas of a community, not just the more affluent sections.

franchise to operate from a local government.[185] Subsequent to receiving a franchise, new systems must file with FCC for a certificate of compliance. Applicants must submit data with their request, including a copy of the franchise and a statement that they will comply with cable television rules.

The rules further required all operators of cable television systems to afford equal opportunity in employment to all qualified persons and prohibited employment discrimination because of race, color, religion, national origin, or sex. FCC adopted similar civil rights requirements for cable television licensees as those previously adopted for over-the-air broadcasters and common carriers. Under these rules, by June 30, 1972, every operating system with five or more full-time employees was required to file an equal employment opportunity program designed to assure fair employment practices for minorities and females. Moreover, applications for certificates of compliance filed for cable systems not operational prior to March 31, 1972, are required to include

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185/ Acknowledging that Federal licensing of cable systems would be an "unmanageable burden," FCC cited the value of local authorities in administering franchise matters and in following up service complaints. Operating under a "deliberately structured dualism," FCC said its function would be to set minimum standards for franchises issued by local authorities, which would cover such matters as the franchise selection process, construction deadlines, length of franchises, fees, complaint handling, and rate changes. These standards would be administered in the certification process. It also pointed out that it was the prerogative of the local government to determine character qualifications for franchise applicants. Local authorities are also permitted to regulate rates charged to subscribers. Tate, supra note 182.

the proposed system's equal employment program with their application. In addition, each system with five or more full-time employees is required to file an annual employment report with FCC by May 31 of each year.[186/]

B. Compliance Mechanisms

1. Equal Employment Opportunity Programs

Under the FCC rules, applicants for a certificate of compliance must submit equal employment opportunity programs or a statement that less than five full-time employees are contemplated as part of the application package.[187/] The guidelines for the programs are identical to those issued for radio and television broadcasters and common carriers. Consequently, the equal employment programs submitted by cable systems suffer from the same deficiencies, i.e., lack of specificity in the analysis of work force and the goals to be achieved.

These deficiencies, however, are far more serious as they relate to cable systems because FCC rules do not require annual programs to be submitted as is the case with common carriers. Further, since cable permittees are not required to have their certificate of compliance renewed every 3 years as are broadcasters, there are fewer defined periods for evaluation of the programs and a limited basis for requiring cable permittees to make any needed changes.

186/ This report is to be filed on FCC Form 395.

187/ All systems in operation as of March 1972 were required to submit equal employment opportunity programs by July 31, 1972.

Once an application is received, it is placed on public notice for 30 days during which time opposition may be filed.[188] The Commissioners make the ultimate decision on the grant of applications and issuance of certificates of compliance. Systems are not allowed to begin operations without a valid certificate. They are free, however, to construct the system facilities.[189] Consequently, the system may conclude construction of facilities without satisfying the requirement for an equal employment opportunity program. This contrasts with the requirements for radio and television broadcasters to have an acceptable program prior to construction of facilities. It constitutes a serious weakness in FCC's enforcement program because if a system has made a substantial investment, it is unlikely that FCC would be willing to deny an application even if deficiencies existed in an equal employment opportunity program.

From July 4, 1972, to May 15, 1973, 1,824 applications for certificates of compliance were placed on public notice. Of these, approximately 60 percent were for new cable television systems.[190] The Bureau has not developed any criteria for evaluating the equal employment opportunity

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188/ If an application is opposed, the Bureau examines the legal issues and makes recommendations for action by the Commissioners.

189/ Interview with Walter Morse, Attorney, Cable Bureau, FCC, July 20, 1973.

190/ The remainder of the applications were for Cable Relay Service (CARS) which is a microwave service owned by a cable system to bring in television signals for use over the system. FCC does not require the submission of equal employment opportunity programs with these applications because it would only serve to duplicate reports already on file. Under FCC rules, only cable television operators can file CARS applications, and consequently they will already have filed the equal employment opportunity program. FCC response, supra note 81.

programs submitted with these applications. Further, only a sampling of the programs were examined. The Bureau indicates no deficiencies were found in the examined programs.[191]

Another feature of the cable rules which acts to the detriment of the civil rights effort is the lack of cyclical renewals of certificates of compliance. Cable systems in existence when the new cable rules became effective in 1972 were allowed to continue until March 1977. Companies granted franchises prior to 1972 were only required to show substantial rather than complete compliance to be granted certificates valid for the same period.[192] Those new systems which fully complied with all cable rules were granted certificates valid for the duration of their local franchise, with a 15-year maximum.[193]

The irregular renewal procedures also present problems for individuals or groups who wish to challenge the issuance of a certificate of compliance. With some systems, a community group would be forced to wait 8 years before having an opportunity to oppose a cable system's application. Most challenges now initiated are against new systems by broadcasters opposed to the expansion of cable television.[194]

191/ FCC indicates that this was because of staff limitations. Id.

192/ FCC has indicated that the term "substantial compliance" does not refer to equal employment requirements, rather it "refers only to franchise requirements, such as distant signal carriage and franchise fees, etc." Wiley letter, supra note 23.

193/ Id.

194/ Id.

One matter relating to civil rights and cable television which was brought to FCC concerned American Television and Communications Corporation, (ATC), Denver, Colorado, and Cox Cable Communications, Inc. (Cox) Atlanta, Georgia. The two companies filed a "Joint Petition for Waiver of Section 76.501 of the Commission Rules" with FCC on October 12, 1972. The waiver was necessitated by a proposed merger between the two companies which would have created 16 situations where there were cross interests between the television broadcast stations and cable television systems which otherwise would be prohibited by the rule. The Community Coalition for Media Change, Berkeley, California, on behalf of 16 minority group organizations,[195] filed an opposition to the waiver request. In December 1972, the parties signed an agreement and filed a copy with FCC. However, due to various other circumstances, in April 1973, Cox and ATC terminated their merger agreement. Consequently, FCC did not have the opportunity to rule on the agreement.[196]

195/ Black Panther Party, Confederación de la Raza Unida, League of United Latin American Citizens, Mexican-American Political Association, NAACP (Western Region), Native American Affirmative Image Committee, Union of Blacks in the Media, United Filipino Association, Chicano Federation (San Diego), Chinese Media Committee of Chinese for Affirmative Action (San Francisco), Community Service Organization (Bakersfield), Euclid Foundation (Los Angeles), La Causa Publications, Inc. (Santa Barbara), La Raza Unida Party (Southern Alameda Chapter), Sacramento Area Cable Television Organizations (Sacramento), and Santa Cruz Community Service Television Project (Santa Cruz). FCC response, supra note 81.

196/ Id.

2. Annual Employment Reports

These reports are submitted on the same FCC form utilized by broadcast and common carrier licensees.[197] For operators with more than one cable system, separate employment reports are to be filed for each headquarters office with more than five full-time employees. Further, one consolidated report covering all the systems' employees must also be submitted. The employment reports are filed by State and community name.[198]

The Cable Bureau, however, has not initiated any review of the employment data. The Bureau indicated that because the reporting requirement did not become effective until 1972, it has not yet developed a monitoring system.[199]

197/ See Section IIA2a infra for a detailed analysis of Form 395.

198/ Reports, for example, from headquarters employment units are filed by community name. Reports from system employment units are filed by State, with cross references where an employment unit served communities in more than one State.

199/ FCC response, supra note 81. In 1973, the Bureau participated in panel discussions on the new cable reporting requirements at the National Cable Television Association regional conferences in Wisconsin and Connecticut. The Bureau emphasized that an employer's compliance with FCC's equal employment opportunity regulations and reporting requirements during the first-year initiation period would subsequently be considered an indicator of the employer's good faith should a complaint be filed against him or her. Id.

The Bureau has attempted to ascertain deficiencies in the reporting requirement. As a result of this investigation, cable systems in 1974, in addition to the regular reporting form, were sent a one page questionnaire which requests those systems with fewer than five full-time employees to also submit data.[200] This would provide the Bureau with comprehensive statistics on employment in the industry. In 1974, the Bureau plans to computerize the employment data to determine if there is any underutilization of minorities and women in cable systems.[201]

3. Complaint Handling

Since the institution of the nondiscrimination prohibitions in 1972, FCC has received only one complaint alleging employment discrimination in cable television. The complaint was referred to the Equal Employment Opportunity Commission and no action has been initiated[202] by the Cable Television Bureau to check with EEOC on the status of the complaint. The cable rules called for every cable system to submit an annual report to FCC by May 31 of each year indicating whether any complaints regarding violations by the system of equal employment provisions of Federal, State, territorial, or local law have been filed before any body having jurisdiction. However, through administrative error, reference to the report was omitted from the instructions on equal employment opportunity. FCC later corrected this deficiency and the reports will be due for the first time on May 31, 1974.[203]

200/ Id.

201/ Morse interview, supra note 189.

202/ FCC response, supra note 81.

203/ Morse interview, supra note 189.

V. Industry Equal Employment Unit

A. Introduction

In July 1972, the FCC Chairman requested that Commissioner Benjamin L. Hooks investigate FCC's criteria and implementation procedures for assessing licensee performance in the area of equal employment.[204] The scope of the inquiry was to include an analysis of the problems in determining valid criteria for evaluating the annual employment reports and the equal employment opportunity programs. Recommendations on options to correct the deficiencies were to be made.

Commissioner Hooks presented his findings and recommendations to the Chairman in August 1972.[205] The preliminary analysis focused on the implementation of the equal opportunity rules in three regulated areas: broadcast, common carrier, and cable television.[206] The report indicated that, although the equal employment rules were administered by the particular bureau having functional responsibility for the

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204/ FCC, Memorandum from Dean Burch, Chairman, to Commissioner Hooks, "Equal Employment Opportunities Programs (External)," July 25, 1972. Chairman Burch indicated that the study was initiated in response to the complex issues involved in the Pennsylvania-Delaware broadcast license renewals. See Section IIA2 supra for a further discussion of this issue. Burch also stated that the "entire effort was of the highest priority for the Commission and for the publics we serve."

205/ Memorandum from FCC Commissioner Hooks to FCC Chairman, "Equal Employment Opportunity Programs (External)," Aug. 16, 1972. Commissioner Hooks, who is black, is the only minority group member on the Commission.

206/ FCC does not have, nor is it proposing, equal employment rules in the other areas of its regulatory responsibilities: safety and special services and radio equipment manufacturers.

industry regulated, none of the bureaus had (1) developed guidelines for rule implementation,[207] (2) analyzed the affirmative action programs of regulated parties, (3) assigned specific full-time or half-time personnel to these functions,[208] or (4) commenced enforcement proceedings for alleged violations of the rule.[209]

The preliminary research pointed out that no single official or administrative entity had responsibility for planning or directing the implementation of these equal employment rules. This diffusion of responsibility resulted in an inconsistent approach to and application of FCC rules, even within individual bureaus.[210] The report contended that the program required positive and uniform efforts if it was to achieve its stated purpose of ensuring equal employment opportunity.

207/ The formula used in the Pennsylvania and Delaware renewal deferrals appears to be the first instance of a systematized approach to rule implementation.

208/ As of January 1, 1973, the Common Carrier Bureau had assigned part-time personnel with civil rights responsibilities.

209/ Hooks memorandum, supra note 205.

210/ Commissioner Hooks cited the example of the Broadcast Bureau, where responsibility for compliance with the equal employment rules is divided between the Research and Education Branch, the Complaints and Compliance Division, and the Renewal and Transfer Division. There is no indication that these intrabureau units have either established or utilized uniform criteria in the evaluation of station performance. Complaints alleging or demonstrating a potential for noncompliance have been handled by the Bureau in a variety of ways: (a) dispatch of delinquency letters for failure to file Form 395; (b) FCC staff investigation; (c) referral of complaints to EEOC; (d) required filing of an early renewal application; and (e) deferred processing of renewal applications for broadcast stations. Id.

Another deficiency noted in the program was the lack of any personnel within FCC assigned to coordinate equal employment opportunity activities or otherwise to act as liaison with other government agencies, i.e., Equal Employment Opportunity Commission, Commission on Civil Rights, Department of Labor, or the Department of Justice. More importantly, FCC's 1973 budget did not provide specifically for such personnel. No plans had been developed by FCC on the issues of rule evaluation, compliance mechanisms, personnel staffing or training, or agency analysis of its activities in all these areas. The conclusion reached by Commissioner Hooks was that, although a foundation for an employment opportunity program had been established, FCC did not have such a program.[211/]

To correct the deficiencies identified in the agency's efforts to ensure equal employment opportunity, it was recommended that an Equal Employment Opportunity Director with agencywide responsibilities be appointed immediately. The Director would be located outside existing organizational units and would report directly to the FCC Commissioners.[212/] Prompt action was urged on this matter so that agency efforts would not

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211/ Id.

212/ Commissioner Hooks' rationale for placing an equal employment opportunity office outside any existing organizational unit was that (1) the office's responsibilities would transcend bureau lines; (2) the function is generally unrelated to the line responsibilities of existing staff units; and (3) conflicts of loyalty would not result if the director were called upon to look into internal problems or bureau investigations.

become further diffused and the equal employment responsibilities would not become firmly embedded in the various organizational units.[213] At their November 29, 1972 meeting, the FCC Commissioners approved the establishment of an "external[214] equal employment opportunity function" within the Office of General Counsel. This line of authority differs markedly from Commissioner Hooks' recommendation and may place limits on the freedom for action of the EEO Director.[215]

B. Responsibilities

The external program for equal employment opportunity, known as the "Industry EEO Unit," did not become functional until May 1973, when FCC appointed a director.[216] The FCC order creating the EEO Unit specifies that its direction is to be guided by Commissioner Hooks and its activities coordinated with the Broadcast, Cable Television, and Common Carrier Bureaus.[217] The Unit consists of two professionals and one secretary. The fiscal year 1974 budget for the office is $55,000. This mainly covers salaries, since administrative support is provided by the Office of General Counsel.

213/ Hooks memorandum, supra note 205.

214/ At the same time, FCC established an "Internal Equal Employment Opportunity Program" to ensure equal employment opportunity within FCC. This program was placed under the responsibility of the Executive Director, who also has general personnel management duties.

215/ It has been asserted, however, that the Office of General Counsel was the best place from which to coordinate activities. Interview with William Kehoe, Assistant General Counsel, Office of General Counsel, FCC, July 20, 1973.

216/ The Director of the Industry EEO Unit is Mr. Lionel Monagas, who was the former Director of Minority Affairs at the National Association of Educational Broadcasters.

217/ FCC, Position Description, Equal Opportunity Officer, Employment.

The primary responsibility of the EEO Unit is to evaluate the sufficiency of the compliance efforts of the involved bureaus and to submit necessary recommendations for improvement. These recommendations may include remedial or disciplinary action when there is a failure to properly discharge equal employment program responsibilities. Further, the Unit is to coordinate the overall execution of the Bureaus' programs to ensure a consistency now lacking in FCC's approach to equal employment opportunity. The Unit's Director has met with the staff of each Bureau responsible for ensuring compliance with the nondiscrimination prohibitions and apprised them of the functions of the Unit.[218] Further, the Bureaus were notified that it is the prerogative of the EEO Unit to make recommendations on any issue with civil rights implications.[219]

The Director, however, has no line authority to implement programs in any Bureau nor does he have signoff approval on any proposed Bureau actions.[220] Unless the recommendations of the Office are treated as having prima facie validity and upheld in the absence of compelling

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218/ Interview with Lionel Monagas, Director, Industry Equal Employment Opportunity Unit, FCC, July 20, 1973.

219/ The EEO Director did contribute to the FCC decision in the Bob Jones University complaint (see Section IIA2d supra, for a discussion of the complaint) and suggested the imposition of a requirement that the station report the affirmative action steps which had been taken for each new hire. Id.

220/ The Renewal Branch of the Broadcast Bureau submits to the Unit its recommendations for which broadcast licensees should receive letters of inquiry on their employment patterns and which should receive conditional license renewals. Shiben interview, supra note 49.

reasons for doing otherwise, the Office will have no power to effect meaningful change.

The EEO Unit has set as its first priority the review of the utilization of the annual employment statistics required of broadcast, common carrier, and cable television licensees.[221] The Unit expects to recommend a consistent approach to be used by all three Bureaus in effectively utilizing the data to assure compliance by licensees with the nondiscrimination prohibitions.[222]

Other planned projects for the Equal Employment Opportunity Unit include an examination of the agency's requirements for affirmative action programs and the development of specific criteria to evaluate these programs.[223] Liaison with licensees subject to the equal employment guidelines, with State and local agencies, community groups, and industry associations that are concerned with the question of equal employment opportunities will also be maintained by the office. Toward this goal, the Director has met with several community groups, including[224]

221/ Annual Employment Reports, Form 395, have been required of broadcasters since 1970, and common carriers since 1971. Cable operators filed reports in 1972 for the first time.

222/ As of March 22, 1974, the Unit indicated that it was preparing to submit a proposal to FCC on a new program for civil rights compliance in the broadcasting industry. The Unit will focus on the other Bureaus after the approval of the broadcast program. Interview with Lionel Monagas, Director, and Clarence McKee, Assistant Director, Industry Equal Employment Opportunity Unit, Mar. 23, 1974.

223/ The Unit has been assigned to study an alternate proposal to identify licensees with discriminatory employment patterns submitted by NOW. For a description of the NOW proposal, see p. 23 note 66 supra.

224/ The FCC Commissioners have also met with several minority and women's groups involved in broadcasting. See Section IID supra.

NOW, the National Latino Media Coalition, and the Citizen's Communication Center.[225]

VI. Legal Services

The complicated nature of regulatory proceedings do not faciliate participation by the public, particularly minorities and women. Legal counsel and services are necessary for individuals or groups to act positively to protect their rights by effective participation in regulatory actions. FCC, however, continues to refuse to provide free legal counsel or services to those who wish to challenge regulatory[226]

225/ Monagas and McKee interview, supra note 222.

226/ In a related matter, FCC denied approval of an agreement between KTAL-TV, Texarkana, and the Office of Communication of the United Church of Christ (UCC). The television licensee had agreed to reimburse UCC for its expenses incurred in assisting a local community group in preparing and filing a petition to deny the license renewal of the station which was subsequently withdrawn. In its appeal of the FCC ruling to the District of Columbia Appeals Court, UCC stated:

> Reimbursement goes to the very question of citizen participation. For if listener groups do not have the capacity to file petitions, they will not be able to effectively reach agreements with broadcasters. The possibility of reimbursement may mean the difference between a group's being able to participate in the regulatory process and its not being able to do so. And it will have a major impact on their continuing future participation in the all-important relationship between the station and the public. Office of Communication v. FCC, Brief for Petitioner, Jan. 25, 1971.

The court remanded the case back to FCC for a determination of whether the expenses submitted by appellant should be allowed in accordance with its opinion. Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972). In a subsequent action, FCC approved the reimbursement. On February 7, 1974, FCC denied a request by a local citizen's group for an order directing radio station WSNT to reimburse the group for legal expenses incurred in an action opposing the station's license renewal, which had been set for hearing by FCC. FCC said the Communications Act contains no mandate to justify such an order. FCC, Report No. 9155, Feb. 7, 1974.

actions but cannot afford the necessary legal assistance.[227] The agency's policy necessarily inhibits those who may have legitimate grievances.[228]

FCC indicates that its policy is based upon a determination that it is not a proper agency function to provide free legal services to one party in litigation before it.[229] In any proceeding designated for hearing, FCC states that its staff is responsible for presenting all relevant information in order to enable the Commission to arrive at an appropriate decision.[230] The judgment of FCC's staff, however, on what information is necessary may differ markedly from that of involved community groups or individuals.

In 1973, FCC initiated a study in conjunction with the Federal Communications Bar Association (FCBA) on the implementation of a program to provide free counsel and expenses to licensees involved in certain actions before FCC.[231] FCC has proposed to pay $25,000 to

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227/ FCC staff has indicated that the agency might reevaluate its position on free legal services. Among areas under consideration is the award of attorney's costs to successful community group petitioners. Monagas and McKee interview, supra note 42. In October 1974, FCC informed this Commission that the award of attorney's fees to successful community group petitioners is not under active consideration. Wiley letter, supra note 23.

228/ On the other hand, ICC has created an Office of Public Counsel to conduct hearings across the country on the reorganization of the Nation's railway system. The program was created under authority of the National Railway Act, which states that ICC may employ those attorneys which it finds necessary. This Office is responsible for determining public sentiment on the proposed reorganization.

229/ FCC response to U.S. Commission on Civil Rights Questionnaire, Aug. 9, 1972.

230/ Id.

231/ The proposal would relate to revocation and renewal cases in broadcasting and to show cause cases in radio and special service. FCC response, supra note 81.

cover the expenses of attorneys provided by FCBA to represent licensees.[232] It is revealing of FCC's priorities that the agency appears willing to appropriate funds to aid the industry it is supposed to regulate in the "public interest"[233] but contemplates no such proposal to aid the public. FCC staff have indicated, further, the agency's opinion that "citizens are already well represented if they're serious."[234]

232/ Kehoe interview, supra note 215.

233/ FCC has stated:

> It must be noted that the FCBA's proposal, if adopted by the Commission, would not "aid the industry." Instead, it is designed to provide free or nearly free legal services to indigent or nearly indigent respondents in Commission procedings, whether they be individuals or corporate licensees' or permittees, such as very small broadcast stations, individual citizens band licensees, etc. The appropriate analogy is in the criminal law, where one accused must be properly represented. The proposal here seeks to aid those indigents against whom the FCC has brought an action that may result in forfeiture or revocation. There is no similar analogy in the civil law to provide financial assistance for complainants and petitioners. Wiley letter, supra note 23.

234/ Kehoe interview, supra note 215.

VII. Organization and Staffing

The monitoring of radio and television broadcasters, cable television systems, and common carriers by FCC to ensure their compliance with the agency's nondiscrimination prohibitions has been assigned to the agency's bureaus with jurisdiction in each field.. Civil rights compliance functions are executed in conjunction with other assignments and no separate unit exists in any bureau solely charged with these responsibilities. The FCC has created, however, an Industry Equal Employment Opportunity Unit to establish agencywide policy and to coordinate the activities of the Bureaus.

The Renewal Branch of FCC's Broadcast Bureau 235/ is responsible for reviewing and evaluating the applications for license renewals submitted by television and radio broadcasters every 3 years. In addition, the Branch also receives applications for the transfer of control of broadcast licenses. Renewal Branch assignments under the equal employment opportunity provisions of the license renewal process 236/ include: reviewing licensees' equal employment programs in conjunction with annual employment reports at license renewal periods; monitoring

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235/ Other units within the Broadcast Bureau which exercise certain functions which relate to broadcast licensees include: the Complaints and Compliance Division, which handles all complaints against broadcast stations, and the Research Bureau, which organizes and analyzes the data provided by licensees on annual employment reports. The Renewal Branch, however, provides a coordinative function and handles those matters in the province of both units as they impinge on license renewals.

236/ See Section IIA2 supra for a discussion of these activities.

conditional license renewals to ensure continuing compliance; and handling of challenges to license renewals, i.e., petitions to deny licenses and competing applications.

The license renewal review process is carried out by the Renewal Branch's professional staff of 25 in FCC's headquarters office. The Branch is organized into a Program Analysis Section and a Legal Section and is directed by a Branch Chief. The Program Analysis Section, with responsibilities for processing license renewal applications, has nine professional staff members. The Legal Section has a staff of 12 attorneys who handle license renewal challenges. 237/

In conjunction with proposals to revise the agency equal employment opportunity regulations, plans have been approved to expand the Branch and add a third section focusing on equal employment opportunity compliance. The new unit will be organized along lines similar to the existing sections and will have a senior supervisor, three equal employment opportunity compliance specialists, and one

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237/ Shiben interview, supra note 49.

broadcast analyst. Hiring for the new unit was scheduled to begin in April 1974.[238/]

In the Common Carrier Bureau, the primary focus of the equal employment opportunity program since its adoption in 1970 has been on EEOC's complaint of discrimination against the American Telephone and Telegraph Company.[239/] The Bureau assigned four attorneys and eight support staff to the investigation of the complaint from 1970 to 1973.

After resolution of the AT&T case, specific responsibility for civil rights activities, i.e., reviewing carrier equal employment opportunity programs, was assigned to the Bureau's Hearing and Legal Division. The Division's professional staff consists of a chief, two attorneys, a statistician, and an economic analyst.[240/] The Chief of the Division has indicated that one attorney will devote 50 percent of his or her time to civil rights matters with the other attorney spending 40 percent. In total, almost 2 staff years are anticipated to be spent on the program in fiscal year 1974, with the possibility of increases in the future.[241/]

238/ Id.

239/ For a discussion of the AT&T complaint, see Section IIIB1 supra.

240/ Juntilla interview, supra note 162.

241/ Other divisions provide additional support when requested, e.g., the Economic Studies Division can fulfill any necessary research assignments. Id.

The Cable Television Bureau is the smallest of the agency's three major divisions and had a professional staff of 45 in fiscal year 1973. The Cable Bureau was organized into four divisions: Research, Applications, Special Relief Requests, and Policy Review and Development.[242] In 1974, the staff allocation was doubled to handle the Bureau's increased activity.[243]

The civil rights monitoring program for cable TV licensees is administered by an attorney in the Policy Review and Development Division.[244] The position of this staff member within the Bureau's organizational structure is uncertain. It was indicated, however, that the assignment would continue to be his wherever he was finally located.[245] Other than the attorney responsible for the program, no staff members are assigned substantial civil rights activities. Bureau staff charged with reviewing applications for certificates of compliance also check applicants' equal employment opportunity programs and annual employment reports.[246]

242/ Morse interview, supra note 189. The Applications Division reviews requests for operating authority while the Special Relief Requests Division processes applications for variances and microwave stations. The Research and Policy Review and Development Divisions fulfill study and counsel functions on cable TV.

243/ Id.

244/ This staff member developed the Bureau's program to assure equal employment opportunity in the cable television industry. Id.

245/ Id.

246/ FCC response, supra note 81.

INTERSTATE COMMERCE COMMISSION (ICC), CIVIL AERONAUTICS BOARD (CAB), AND FEDERAL POWER COMMISSION (FPC)

The Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Power Commission are independent regulatory agencies created to oversee in the public interest specific sectors of American industry. They exercise a large degree of control over the activities of the surface and air transportation industries and the utilities industry.

There are important civil rights issues involved in the activities of these industries, and the agencies responsible for their regulation can contribute significantly to furthering the cause of equal opportunity. Of marked relevance in this regard is the issue of equal employment opportunity within the regulated industries. In addition, these agencies have responsibility for ensuring that the services and facilities offered by their licensees are provided on a nondiscriminatory basis. The issue of free legal services and counsel for those who wish to challenge regulatory actions but are financially unable to do so is also particularly related to the public interest mandate of ICC, CAB, and FPC.

I. Equal Employment Opportunity

A. Introduction

Over the last few years, this Commission has often indicated its view that ICC, CAB, and FPC possess ample authority to issue and enforce regulations prohibiting employment discrimination within the industries they regulate.[247/] All three agencies are charged with the regulation of these industries in the public

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247/ Although the ICC, CAB, and FPC are governed by the same criteria of serving the public interest as the FCC, none of the three has taken similar action to prevent employment discrimination in the industries they regulate. Indeed, none has gone so far as to assert that it has authority to take such action. In this Commission's view, the broad and plenary power granted to all three agencies by Congress to control the interstate operation of those industries is ample, in each case.

> .../T/he agencies would appear to have clear legal authority to use their broad rulemaking power in support of the established national policy of equal employment opportunity, concerning which all three branches of the Government have acted.

U.S. Commission on Civil Rights, The Civil Rights Enforcement Effort 275-77 (1971) /hereinafter cited as Enforcement Effort report/. See also The Federal Civil Rights Enforcement Effort, One Year Later 178-86 (1971) [hereinafter cited as One Year Later report] and The Federal Civil Rights Enforcement Effort--A Reassessment 409-12 /hereinafter cited as Reassessment report/.

This Commission has also commented to ICC and CAB in support of their rulemaking petitions on equal employment guidelines: John A. Buggs, Acting Staff Director, U.S. Commission on Civil Rights, Statement of the United States Commission on Civil Rights Before the Interstate Commerce Commission, Nov. 30, 1971; and John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Statement of the United States Commission on Civil Rights Before the Civil Aeronautics Board, Sept. 25, 1972.

interest.[248] Although ICC, CAB, and FPC have frequently viewed their public interest responsibilities narrowly,[249] court decisions have made it clear that the agencies' primary responsibility goes beyond mere protection of the regulated industries under their jurisdiction,[250] but rather is to serve and protect the general public.[251]

The agencies not only regulate the industries, but also have extensive power to issue, revoke, extend, or amend licenses.[252] In effect, the regulatory agencies determine who may enter the industries and the scope of their participation.[253] All these regulatory powers, however, must be exercised with a view to promoting and protecting

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248/ 49 U.S.C. § 304(6) (Interstate Commerce Act).
16 U.S.C. § 825(h) (Federal Power Act).
15 U.S.C. § 717(e) (National Gas Act).
49 U.S.C. § 1324 (Federal Aviation Act).

249/Knowledgeable sources indicate that ICC and CAB have often acted to protect interests they were supposed to regulate rather than the public interest. See, e.g., S. Lazarus, The Genteel Populists 239 (1970) and L.M. Kohlmeier, The Regulators 5, 6 (1969).

250/Udall v. Federal Power Commission, 387 U.S. 428 (1967) and Banzhaf v. Federal Communications Commission, 405 F.2d. 1082 (D.C. Cir. 1968).

250/ICC v. Parker, 326 U.S. 60, 66 (1945). Citizens for Allegan County Inc. v. Federal Power Commission, 4 F.2d. 1125, 1133 (D.C.Cir. 1968) and Western Airlines v. Civil Aeronautics Board, 184 F.2d. 545, 549 (9th Cir. 1950).

252/ As this Commission has noted, the legal relationship of FPC to the industries it regulates differs from that of ICC and CAB. However, FPC is governed by the same principle of serving the public interest. Enforcement Effort report, supra note 247, at 276 note 43.

253/ 49 U.S.C. §§ 306, 307 (ICC).
15 U.S.C. § 717 f, c (FPC).
49 U.S.C. § 1302 (CAB).

the public interest. It is now well established that broader environmental and social effects are relevant to the determination made by the agencies.[254/]

There can be no question that the adoption of fair employment practices is in the public interest. Equal employment opportunity is not only an established national policy but also the law of the land.[255/] It follows, then, that the agencies may properly address problems of employment discrimination when they are considering applications for operating authority and in exercising any of their discretionary powers.

254/Court decisions have made clear that such factors are relevant to the activities of a Federal regulatory agency, see, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Palisades Citizens Association Inc., v. CAB, 420 F.2d. 188 (D.C. Circ. 1969); Scenic Hudson Preservation Conference v. FPC, 354 F.2d. 608 (2nd Cir. 1965); Office of Communication of the United Church of Christ v. FCC, 359 F.2d. 994 (D.C. Circ. 1966); Red Ball Motor Freight, Inc. v. Herrin Transp. Co., 98 F. Supp. 248 (N.D. Tex. 1950); Inland Motor Freight v. United States, 36 F. Supp. 885 (D. Idaho, 1941).

255/This policy is embodied in the Constitution, Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and Executive Orders 11246, 11375 and 11478. Discrimination by Federal contractors has been banned by Executive orders for more than 30 years. In addition to Federal requirements, employment discrimination on the grounds of race, color, religion, sex, and national origin, is outlawed under the statutes of more than 30 States.

Beyond the question of authority, there is considerable evidence that the agencies are not only authorized but are obliged to assure nondiscrimination in all aspects of the operation of the industries they regulate, including employment practices. As this Commission has noted, there is a serious question whether failure to do so places the agencies in the position of violating the Constitution.[256] A certificate of authority confers on the regulated company the privilege to enjoy special uses of part of the public domain. Further, it permits the holder a certain freedom from the extensive kinds of competition with which it would normally be confronted.[257] Accordingly, as recipients of these forms of public largess, the regulated industries are required to meet the highest standards which are embraced in the public interest.[258] Yet, by granting authority and continuing their regulatory support of industries which discriminate, the agencies, whether by intent or omission, are aiding in the perpetration of industry practices which violate the fifth amendment of the Constitution.[259]

256/ Enforcement Effort report, supra note 247 at 277.

257/ In a sense, the regulated industries enjoy a federally-protected monopoly because of the limited number of licenses that are granted. By the licensing mechanism, the regulatory agencies are able to control new entry into the market and, thus, effectively reduce the amount of competition a licensee must face.

258/ Television Corporation of Michigan, Inc. v. FCC, 294 F.2d. 730 (D.C. Cir. 1961).

259/ See Enforcement Effort report, supra note 247, at Legal Appendix, for a discussion of the constitutional issues involved in discrimination by regulated industries.

In addition to the issue of the authority of the regulatory agencies to institute equal employment guidelines, the question of the necessity for such rules is of significance. ICC, CAB, and FPC each question whether the need for action has been precluded by establishment of agencies with specific civil rights enforcement responsibilities, i.e., the Equal Employment Opportunity Commission (EEOC) [260] and the Office of Federal Contract Compliance (OFCC) of the Department of Labor. [261]

The industries which are regulated by ICC, CAB, and FPC have severe problems of underemployment and underutilization of minority group members and females. [262] In most cases, their employment patterns are significantly worse than those found in other sectors of American industry.

The agencies which have been specifically delegated to monitor civil rights compliance have had only limited resources in comparison to their responsibilities. The jurisdiction of EEOC, for example, extends to over 30 million workers, [263] while

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260/ EEOC was established to implement Title VII of the Civil Rights Act of 1964 which prohibits discrimination by private employers, labor unions, and employment agencies on the basis of race, sex, color, religion, and national origin. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort-1975-Employment ch. 3 (in print) for a description of the role of EEOC.

261/ Executive Order 11246 prohibits employment discrimination by Federal contractors and assigns the Department of Labor the responsibility for overseeing its implementation. For a detailed description of the operations of OFCC, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement-1975-Employment ch. 2 (in print).

262/ For a discussion of the employment patterns of the industries regulated by ICC, CAB and FPC, see Sections IB1, IC1, and ID1 infra.

263/ EEOC, 7th Annual Report 27 (1972)

OFCC covers approximately the same number of employees.[264] In the 10-year period since their creation, these agencies have had only limited impact on the Nation's employment practices. To the extent that ICC, CAB, and FPC can assist in the furtherance of the national policy of equal employment, the task of the primary enforcers will be eased justifiably. Indeed, the Federal contract compliance program operates under the aegis of 17 Federal agencies. The addition of two or three more cannot logically be labeled as duplicative of existing efforts.

Of further consequence is the persuasive effect which the issuance of equal employment rules by the regulatory agencies would exert on their relevant industries. The Federal Communications Commission (FCC), for example, instituted such guidelines for its licensees in 1970. Although the agency has not been aggressive in its enforcement of these regulations, even its limited program has had a significant impact on the employment patterns of the broadcasting industry.[265]

The civil rights enforcement agencies also possess only limited remedies to ensure compliance with the Nation's equal employment statutes. It was not until 1972 that EEOC received the authority

264/ Interview with George Travers, Associate Director, Plans, Policies and Programs, OFCC, July 27, 1973.

265/ For a discussion of FCC's program to monitor the employment practices of its licensees, see ch. 1, Section II A supra.

to initiate legal action against employers, labor organizations, and employment agencies,[266] and as of March 1974, the agency had instituted only 283 such cases.[267] The focus of EEOC's compliance efforts continues to be on the conciliation of individual complaints.[268]

OFCC has the authority to terminate Federal contracts and to debar Federal contractors for discriminatory employment practices, but since its creation in 1965, it has exercised these sanctions only four times.[269] A major reason for the lack of enforcement action by OFCC is the inflexible nature of the sanction it can impose. It may be unrealistic in some cases to believe that the Government would terminate a contract for services it requires, such as telephone services, fuel, electric power, or transportation of the mail. In contrast, the regulatory agencies have extensive and varied enforcement powers which allow them to revoke licenses, levy fines, initiate legal proceedings, or issue amendments to authorizations to operate.

266/ Under the Equal Employment Opportunity Act of 1972, EEOC, if unable to secure an acceptable conciliation agreement within 30 days after the filing of the charge, is authorized to file an action against the respondent in a U.S. district court. In March 1974, EEOC gained the exclusive power to file pattern and practice discrimination suits, a power previously exercised concurrently with the Department of Justice.

267/ U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1975 - Employment ch. 3 (in print) for a discussion of the operation of EEOC.

268/ At the end of fiscal year 1973, EEOC had a backlog of over 69,000 complaints awaiting action and the agency predicted the backlog would reach 95,000 by the end of Fiscal Year 1974. Id.

269/ Travers interview, supra note 264. For a discussion of OFCC's activities, see also U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1975 - Employment ch. 2 (in print).

The Attorney General of the United States has brought over 100 lawsuits alleging employment discrimination in the last 5 years. Private litigants and civil rights groups have initiated an even larger number of such cases during the same period of time. Many of these cases have been filed against members of regulated industries. Yet employment discrimination still appears to be widespread in these industries and the present administrative and judicial tools seem incapable of effectively dealing with a problem of such magnitude within a reasonable period of time.

The manifest example of the potential importance of action by the regulatory agencies is provided by the pivotal involvement of FCC in EEOC's action against the discriminatory employment practices of the American Telephone and Telegraph Company (AT&T). FCC rules prohibiting its regulatees[270] from discriminating on the basis of sex, race, color, religion, or national origin[271] apply to all communications common carriers including AT&T and its 24 subsidiary operating companies such as New York Telephone or New Jersey Bell.

270/ A communications common carrier is one whose services are available for public hire for handling transmissions by electrical means.

271/ For a more complete treatment of FCC's employment discrimination rules, see ch. 1, Section IIA supra of this report.

Since 1965, the company had been the target of complaints of discriminatory employment practices under the provisions of the Equal Pay Act of 1963,[272] Title VII of the Civil Rights Act of 1964, and Executive Order 11246.[273] EEOC, which is responsible for securing compliance with Title VII, investigated many of the allegations against the company and by 1970, had documented the existence of deep-rooted systemwide discrimination in employment. At that time, however, EEOC lacked the power to initiate legal action against the company and was forced to limit its efforts to conciliation of individual complaints.

EEOC was searching for a method of initiating action when AT&T filed with FCC for an application to increase long distance telephone rates. On December 10, 1970, EEOC filed a motion to intervene in the proceeding and urged FCC to deny the proposed rate increases alleging that the Bell System Companies were engaged in widespread discrimination against women, blacks, persons of Spanish speaking background, and other minorities. FCC agreed to establish a separate proceeding on the question of the company's employment practices and held public hearings over a 6 month-period.

272/ The Equal Pay Act of 1963, which requires men and women to receive equal pay for equal work, is administered by the Wage and Hour Division of the Department of Labor.

273/ Executive Order 11246 requires Government contractors to take affirmative action to insure that minorities are not discriminated against. Executive Order 11375, issued in December 1971, added women to those groups protected by Executive Order 11246.

During this time, extensive negotiations were held between EEOC, the Department of Labor, and AT&T. These negotiations led to a landmark settlement, in which AT&T agreed to alter its system of hiring, promoting, and transferring employees, to establish goals and timetables for each of 700 geographical areas in order to enlarge and upgrade its female and minority employees, and to end any sex stereotypes associated with its jobs.[274] Further, AT&T committed itself to making payments of $15 million to 13,000 women and 2,000 male members of minority groups who had suffered job discrimination.[275] Subsequent to the signing of the agreement, FCC complied with an EEOC request to terminate the proceeding but noted its intention to monitor the implementation of the agreement.

The comprehensive action against employment discrimination in the Bell System Companies affecting over 700,000 workers would not have been possible without the avenue of action provided by FCC's equal employment regulations. Positive action by ICC, CAB, and FPC concerning the issuance of equal employment opportunity regulations covering their regulatees could lead to similar settlements, thus resulting in a reversal of the white male dominance prevalent in the industries they regulate.

274/ FCC, Memorandum Opinion and Order, Docket No. 19143, Apr. 9, 1973.

275/ Id.

B. Interstate Commerce Commission

The Interstate Commerce Commission was created to regulate, in the public interest, carriers engaged in interstate railroad transportation.[276] ICC's authority and the scope of its jurisdiction has been broadened by subsequent legislation[277] to include most modes of surface transportation.[278] ICC exercises regulatory control over carriers through the issuance of licenses, the review of rates, and the approval of mergers or sale of carriers.[279]

276/ ICC, the oldest of the regulatory agencies was established by the Act to Regulate Commerce of February 4, 1887, now known as the Interstate Commerce Act. 24 Stat. 379, 383.

277/ Some of the major amendments to the 1887 statute were the Elkins Act, Hepburn Act, Panama Canal Act, Transportation Act, Motor Carrier Act, Reed-Bullwinkle Act, and Interstate Commerce Act of 1942. Some sources indicate that ICC's jurisdiction was extended at the impetus of the trucking industry. See Lazarus, supra note 249, at 89, 90.

278/ ICC's jurisdiction extends to 342 railroads, 3,973 trucking companies, 105 buslines, 81 water carriers, 84 freight forwarders, 133 transportation brokers, and one express agency. ICC, 86th Annual Report 131 (1972). ICC does not have regulatory authority over interstate trucks carrying certain agricultural products; water carriers transporting bulk commodities, such as oil; and carriers engaged in private operations (not selling transportation to the public). The Department of Transportation, which was created on April 1, 1967, assumed some duties previously handled by ICC, basically the authority to prescribe and enforce safety regulations for motor carriers, oil pipelines, and railroads; the transporation of explosives and dangerous articles; and the administration of daylight saving time

279/ ICC issues a "certificate of public convenience and necessity," i.e., an authorization to operate, to trucking companies, buslines, freight forwarders, water carriers, and transportation brokers. Rates for service are filed with ICC but are not ruled upon by it unless a protest is received. Plans for merger or sale of carriers are initiated by carriers and are subject to ICC approval.

Trucking is one of the fastest growing industries in the Nation and performs a vital function within the economy. This growth has been facilitated by the decline of the railroads and the expansion of the national highway system.[280] The industry anticipates a steady expansion of jobs for the remainder of the decade.[281] The growth pattern and the characteristics of occupations within the trucking industry demonstrate that significant employment opportunities exist for minority group members and women.

280/ The growing dominance of the industry is illustrated by its prevalence as the preferred carrier of many processors and manufacturers. For example, 98.4 percent of all fish and seafood is transported to market by truck, as is 82.1 percent of clothing, 68.3 percent of drugs, 91.1 percent of office and accounting machinery, 86.7 percent of meat, 97.3 percent of poultry, and 75.3 percent of radios and televisions. American Trucking Association, American Trucking Trends 1970-71 14 (1970).

281/ The Bureau of Labor Statistics predicts approximately 8,400 additional job openings for long-haul drivers each year through 1980. U.S. Department of Labor, Occupational Outlook Handbook (1970).

1. Equal Employment Opportunity - The Industry Record

Employment statistics reported by the Equal Employment Opportunity Commission indicate a total employment for the trucking industry in 1970 of nearly half a million persons.[282] The spectrum of occupations in the industry is not broad, with 75 percent of employees in blue-collar and service jobs.[283] The operatives category[284] accounts for nearly half of all jobs in the industry and includes the local and long distance truck drivers who are the mainstay of the industry. Skilled workers, mostly mechanics, constitute less than 8 percent of all employees. Although the industry is characterized by occupations with relatively low entry-level skills, wage rates are comparatively high.[285]

282/ The data used in this section are found in a report sponsored by the Equal Employment Opportunity Commission, J.E. Nelson Equal Employment Opportunity in the Trucking Industry: An Industry at the Crossroads (November 1971). For a further evaluation of the employment patterns in the trucking industry, see Initial Statement of Equal Employment Opportunity Commission, Ex Parte No. 278, Equal Opportunity in Surface Transportation, Before the Interstate Commerce Commission, 7-23 and attachment (Dec. 1, 1971).

283/ There are relatively few occupational categories within the trucking industry and they usually fall into the general categories utilized by EEOC in its reporting form EEO-1. White collar positions include officials and managers, professional, technical, sales, office, and clerical workers. Blue-collar jobs include craftsman, operatives, laborers, and service workers.

284/ EEOC defines operatives as semiskilled workers who operate machines or processing equipment or perform other factory-type duties of an intermediate skill level which can be mastered in a few weeks with only limited training. EEOC, Employer Information Report EEO-1, January 1970.

285/ The average wage rate in 1971 was $11,613. American Trucking Association, American Trucking Trends - (1972-1973) 14 (October 1972)

The trucking industry has a poor record for the hiring of minority group members and for the employment of women in other than clerical positions. Blacks constitute only 7.3 percent of total industry employment,[286] with greatest representation in the lowest paid classifications, i.e., laborers (17.3 percent) and service workers (23.8 percent). Black participation steadily decreases with each step up the occupational ladder.[287] Representation in each of the five white-collar categories is low.[288] Only 2.4 percent of these employees are black, which 75 percent of those in clerical positions.

Persons of Spanish speaking background constitute only 2.3 percent of the total industry work force and suffer from the same discriminatory patterns as black employees. They are concentrated in lower paying jobs, in particular in the laborer (4.8 percent) and service worker (3.9 percent) categories. Upward progression in the occu-

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286/ The 1970 census indicated a total population in the United States of 203,211,926. Of this total, 22,580,289 or 11.1 percent were black; 9,073,237 or 4.5 percent were Spanish surnamed; and 2,882,662 or 1.4 percent were classified as Other Races and included Indians and Japanese, Chinese, and Filipino Americans. Department of Commerce, Bureau of the Census, General Population Statistics, United States Summary (January 1972).

287/ For example, blacks make up only 6.9 percent of operatives and 5.3 percent of craftsmen .

288/ For example, out of a total industry sales force of 7,600 workers, only 61 (0.8 percent) are blacks. There are fewer than 500 blacks among the industry's 35,800 officials and managers.

pational categories, similarly reveals an underutilization of employees of Spanish speaking background.[289] Only 0.8 percent of Spanish surnamed employees in the industry are officials and managers.[290]

Women in the trucking industry have traditionally been confined to clerical positions, with 93 percent of the female industry work force in this category.[291] White-collar positions other than clerical work account for 3.8 percent of the female work force and only 3.2 percent of the women in the trucking industry are employed in blue-collar positions,[292] although sex is not a bona fide occupational qualification for any job in the industry. Thus, women have been almost totally excluded from the blue-collar and service worker professions in this Anglo male dominated industry.

Employment statistics also attest to an exclusion of minorities and females from over-the-road driving positions. The truck driving occupations are the bulwark of the industry and are usually divided into over-the-road (road) drivers and city (short-haul) driving

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289/ Spanish surnamed Americans comprise only 2.1 percent of the operative category, 2.3 percent of craftsmen, and 1.9 percent of office and clerical workers.

290/ There is a Spanish surnamed participation rate of 1.7 percent for professionals, 1.6 percent for technicians and 0.6 percent for salesworkers.

291/ Women comprise only 8.6 percent of the industry work force.

292/ Women comprise only 2.2 percent of the officials and managers, 5.2 of professionals, 8.2 percent of technicians, and 4.2 percent of the sales force.

classifications. Over-the-road drivers enjoy higher wages and status in the industry[293] and traditionally have been white males. These driving positions offer significant opportunities as entry-level positions for minorities and females since their initial job requirements are low, the training period is short, and the pay is relatively high. Exact figures on the number of minority over-the-road drivers are not available;[294] however, statistics compiled by the U.S. Postal Service Office of Contract Compliance[295] show that while blacks comprised 6.9 percent of city drivers in the industry, they represented only 2.7 percent of road drivers. Persons of Spanish speaking background constituted 0.8 percent of the industry's road drivers as opposed to 3.4 percent of city drivers.

293/ Over-the-road drivers, as a group, are the highest paid wage earners in the industry. Their salaries average about $11,000 a year, compared with an average annual salary for local drivers of about $8,000. Occupational Outlook Handbook, supra note 281.

294/ The EEO-1 employment reports filed annually by trucking companies with EEOC do not give a specific figure for road drivers; both categories of drivers are combined under the heading of operatives.

295/ These statistics were compiled from compliance reports submitted to the U.S. Postal Service in 1970. The data were obtained from 329 trucking companies which had a total employment of 131,359. Nelson, supra note 282.

Further evidence of the discriminatory employment patterns in the industry is provided by the large number of cases that have been filed by the Department of Justice against trucking companies.[296] These cases have charged discriminatory policies in hiring, transfer, promotion, and recruitment. In October 1973, the Department sent letters to 514 trucking companies, the Teamsters Union, and Trucking Employers, Inc., the bargaining arm for many major truckers, warning that a class accion suit against common carriers was imminent if discrimination continued in the industry's employment practices.[297] When compliance was not forthcoming, the Department filed suit against 349 employers in the trucking industry.[298]

296/ The following suits have been filed by the Department of Justice against trucking companies:

United States v. Roadway Express, 457 F. 2d. 854 (6th Cir. 1972); United States v. Associated Transport, Inc. (M.D.N.C. 1968); United States v. Central Motor Lines, 352 F. Supp. 1253 (W.D.N.C. 1972); United States v. Carolina Freight Carriers (W.D.N.C. 1971); United States v. T.I.M.E. Freight, Inc. (M.D. Tenn. 1971); United States v. Strickland Transp. Co. (N.D. Tex. 1971); United States v. Pilot Freight Carriers, Inc. (M.D.N.C. 1971); United States v. Navajo Freight Lines, Inc. (C.D. Cal. 1972); United States v. Interstate Motor Lines (W.D. Mich. 1972); United States v. Terminal Transp. (N.D. Ga. 1972); United States v. Lee Way Motor Freight (W.D. Okla. 1972); United States v. East Texas Motor Freight (N.D. Tex. 1972); United States v. Thurston Motor Lines, Inc. (W.D.N.C. 1974).

297/ Letters from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, to 514 trucking companies; to Counsel for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and to Trucking Employers, Inc., Oct. 25, 1973.

298/ This suit was filed on March 20, 1974. At that time a consent decree was submitted which granted part of the relief sought by the Department of Justice. The Department was continuing to pursue this case as of June 1974. United States v. Trucking Employers, Inc. (D.D.C. Cir. No. 74-454 Mar. 20, 1974).

The railroad industry has similarly been the focus of litigation by the Department of Justice.[299] Employment statistics for the industry illustrate a bleak picture of equal employment opportunity. In 1971, less than 6 percent of the industry's total work force was female and over 90 percent of these employees were relegated to office and clerical positions.[300] Minority group members constituted 11.3 percent of total employment of railroads and were concentrated in the labor and service worker category.[301]

The employment profile of intercity bus transport companies also indicated the existence of discriminatory employment practices. Female employees constituted only 10 percent of total employees and more than half of these employees were concentrated in office and clerical positions.[302] Female participation in craft and semiskilled positions was less than 1 percent. Furthermore, over 37 percent of all blacks employed were in the positions of laborer or service worker. Blacks held only 7.4 percent of craftsmen positions, 3.9 percent of officials and managers positions, and 2.4 percent of all professional jobs.[303]

299/ United States v. St. Louis-San Francisco Ry. Co. (E.D. Mo. 1967); United States v. Jacksonville Terminal Co. (M.D. Fla. 1968); United States v. Chesapeake & Ohio Ry. Co., 471 F. 2d. 582 (4th Cir. 1972); and United States v. Florida East Coast Ry. (M.D. Fla. 1971).

300/ Reply Statement of Equal Employment Opportunity Commission, Ex Parte 278, Equal Opportunity in Surface Transportation, Before the Interstate Commerce Commission, Oct. 10, 1971.

301/ Minorities comprised only 3.7 percent of all the white-collar jobs in the industry and only 1.2 percent of the railroads' officers and managers were minorities. Id.

302/ Id.

303/ Several Title VII court cases have been filed against Greyhound Inc., the largest company in the intercity motor bus transportation field. E.g., Newby v. Southern Greyhound Lines (N.D. Ga., filed May 14, 1969); Carey v. Grehound Bus Co. (E.D. La., filed Feb. 24, 1971); Johnson v. Greyhound Lines-West (N.D. Cal., filed June 14, 1971); and Fosiede v. Greyhound Lines, Inc. (N.D. Cal., filed July 16, 1971).

2. Equal Employment Rules

In September 1970, this Commission recommended that ICC issue equal employment guidelines for all carriers under its jurisdiction.[304/] Subsequently, on March 11, 1971, ICC was formally petitioned to utilize its regulatory powers to end discriminatory employment practices in the trucking industry.[305/] Shortly thereafter, ICC instituted a proposed rulemaking procedure to determine, in large part, whether it had jurisdiction over employment practices of motor

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304/ Since 1970 this Commission has been of the opinion that ICC has authority and moreover has the obligation to act to prevent employment discrimination by its licensees. Enforcement Effort report, supra note 247, at 277, 78 and Legal Appendix. (The report was initially issued in 1970 and was dated 1971 upon reprinting.) This position was also stated in One Year Later report, supra note 247, at 184, and Reassessment report, supra note 247, at 412. For opinions of other civil rights groups on ICC's authority to act in this area, see:

(a) Initial statement of Equal Employment Opportunity Commission, supra note 282.

(b) Letter from David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, to Robert L. Oswald, Secretary, ICC, Dec. 1, 1971.

(c) Initial statement of John L. Wilks on Behalf of the Office of Federal Contract Compliance, U.S. Department of Labor Before the Interstate Commerce Commission, Ex Parte 278, Dec. 1, 1971.

305/ The petition for equal employment rules was filed by Reuben B. Robertson III and Eileen M. Schneider. The petition was accompanied by a proposed regulation, by an extensive memorandum on the discriminatory patterns in the trucking industry, and by a review of the applicable law and policy considerations bearing upon ICC's authority and responsibility.

carriers.[306] As this Commission has previously noted,[307] the institution of a proposed rulemaking procedure introduces an additional step into the rulemaking process. Even after the agency concludes the present proceeding,[308] any rules would have to be separately issued for public comment. This extra process is unusual because the questions to be considered are basically legal. It opens for public comment questions which would appro-

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306/ The rulemaking procedure, Ex Parte 278, Equal Opportunity in Surface Transportation, May 6, 1971 was for the purpose of examining:

(a) Whether discrimination because of race, color, religion, sex, or national origin exists in the employment and other practices of carriers subject to jurisdiction;

(b) Whether any discrimination as may be found to exist is violative of the law;

(c) Whether the ICC has the jurisdiction to deal with any unlawful discrimination which it may find; and

(d) Whether it should promulgate rules or regulations or undertake some other program in this area.

307/ Reassessment report, supra note 247, at 409.

308/ In a letter to this Commission, ICC indicated that:

> In view of the controversial and varying range of views and issues anticipated, and received, in this proceeding for resolution, this Commission considered it best to seek, initially, suggestions from the public which would enable us to determine first whether we have authority to issue these rules, and if so, whether such rules are needed and then to promulgate the most fitting and workable rules. If the decision on the first two of these is affirmative this procedure will effectively foreclose any further discussion of issues which could have delayed the proceeding indefinitely, and will narrow the point of controversy essentially to those rules which may be proposed. We believe this procedure is of service and benefit to the public...and aids this Commission as well. Nevertheless, because specific rules were not proposed, for the reasons discussed above, the Interstate Commerce Act and the Administrative Procedure Act (5 U.S.C. 553 and 557) require that we give the public an opportunity to comment on the actual rules proposed, if the Commission determines that such rules are appropriate and warranted. Letter from George M. Stafford, Chairman ICC, to Arthur Flemming, Chairman, U.S. Commission on Civil Rights, Oct. 3, 1974.

priately be decided by an agency's own counsel.[309]

The deadline for receipt of public comments on the rulemaking was in January 1972, yet no further action has been taken by ICC. The Section of Operating Rights of the Office of Proceedings is responsible for analyzing the public comments on the rulemaking and for researching the question of ICC's authority to act on carriers' employment practices. By June 1973, the staff of the Section had concluded its assignment. Any further action on this matter must now come from the ICC Commissioners. Although the rulemaking has now been pending before ICC for 37 months, there is apparently no resolution in sight. The agency refuses to speculate when a decision will be forthcoming, expressing hope for final resolution within a "reasonable time."[310] ICC's delay[311] in issuing a decision on the equal employment rulemaking, especially in light of the supportive statements issued by EEOC and the Department of Justice, is inordinate.[312]

309/ It was the personal opinion of ICC's General Counsel that the agency possesses sufficient legal authority to issue the equal employment rules. Interview with Fritz Kahn, General Counsel, ICC, June 13, 1973.

310/ Interview with Henry Snavely, Deputy Director, Section of Operating Rights, Office of Proceedings, ICC, June 19, 1973.

311/ ICC has recently written that:

> Expedition is, of course, in the public interest in any proceeding before this Commission. We believe however, that the public interest will be best served if our ultimate decision reflects a comprehensive evaluation of all the evidence of record. I can assure you that in Ex Parte No. 278 this Commission is making a concerted effort to achieve a just result. Stafford letter, supra note 308.

312/ In July 1972, ICC indicated that it would not be possible to give any commitment regarding a date when a final decision could be expected. ICC Response to U.S. Commission on Civil Rights Questionnaire, July 28, 1972. Almost a year later, in June 1973, ICC again stated that it would not be proper to give any commitment regarding a date when a final decision would be forthcoming. ICC Response to U.S. Commission on Civil Rights Questionnaire, June 1, 1973 [hereinafter cited as ICC response].

C. Civil Aeronautics Board

The Civil Aeronautics Board, under authority of the Civil Aeronautics Act[313] and the Federal Aviation Act,[314] regulates and promotes, in the public interest, commercial air transportation within, as well as to and from the United States.[315] The most significant of the agency's regulatory and promotional activities include the award of operating authority to air carriers, the regulations of rates and fares, and the support of air service with subsidy payments.[316]

CAB requires domestic air carriers engaged in air transportation[317] within, or to and from the United States to file for a certificate of public convenience and necessity authorizing their routes and operations.[318] The major part of the agency's route activities

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313/ 52 Stat. 973, 49 U.S.C. § 1321 (1970).

314/ 72 Stat. 731, 49 U.S.C. § 1341 (1970).

315/ Some sources indicate that CAB was created at the impetus of the major airlines to stabilize the economy of the industry. Lazarus, supra note 249, at 54, 55.

316/ CAB does not regulate purely intrastate air transportation. In addition, prior to 1967, CAB had responsibilities with respect to aviation safety but these functions have been transferred to the Federal Aviation Administration of the Department of Transportation.

317/ Air transportation for this purpose means the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft.

318/ Services by foreign air carriers are covered by foreign air carrier permits.

involve the domestic transportation system which is four times as large as its international counterpart.[319] CAB's jurisdiction covers 35 scheduled air carriers, 12 supplemental carriers, and over 3100 air taxi operators.[320] CAB also exercises authority over the rates for domestic air transportation[321] and requires air carriers to file all new charges with the agency.[322] It is responsible for reviewing these rates to ensure that they are just, reasonable, and nondiscriminatory.[323]

319/ The majority of applications for certificates come from existing air carriers seeking to alter their route structures.

320/ Supplemental carriers are primarily those which provide charter and nonscheduled service. Air taxi operators are usually small, one-person companies which provide service between airports and metropolitan locations.

321/ Overseas and foreign air carriers must also file their rate charges with CAB but the agency is not empowered to suspend or investigate the rates on grounds of reasonableness. Only where discrimination in rates appears to be involved can CAB investigate overseas and foreign air carrier services.

322/ Other CAB responsibilities include the regulation of agreements and interlocking relationships among air carriers and between air carriers and other aeronautical enterprises, and regulation of air carrier accounting and reporting.

323/ CAB can suspend the effectiveness of rates for up to 180 days if a determination is made that the rates are unlawful. During this period CAB can, with notice and hearing, determine and prescribe the rate it deems to be lawful. Also, the agency can, on its own motion, investigate an existing rate and after notice and hearing, require it to be changed.

Since it came into existence in 1938, CAB has been empowered to make subsidy payments to air carriers in areas where air service operations would be marginal for the carriers.[324/] In the past ten years, the number of carriers receiving Federal subsidies has steadily dwindled. In fiscal year 1973, 13 air carriers received $72,230,000 under this program.[325/]

The air transportation industry is a young one which has experienced rapid technological changes since its inception less than 60 years ago. In the last two decades, air transportation has become a dominant mode of passenger travel. In 1969, 75 percent of the common carrier passenger miles were logged by airlines; 20 years earlier the figure was only 14 percent. Further, America's scheduled airlines carried more than 159 million persons in 1969 compared to fewer than 17 million in 1949.[326/] Employment in the

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324/ CAB's administration of the subsidy program is directed so as to "maintain and continue the development of air transportation to the extent and the character and quality required for the commerce of the United States, the Postal Service and the national defense." (Federal Aviation Act of 1958, 72 Stat. 731.) The amount of subsidy payments is determined on the basis of the carrier's need to enable it to meet the public service responsibilities defined by CAB.

325/ Interview with William Gingery, Chief, Bureau of Enforcement, CAB, Dec. 14, 1973. For a further discussion of this program, see pp. 147-150 infra.

326/ M.P. Rogers, Profile of the Air Transportation Industry (April 1971), published by the Equal Employment Opportunity Commission.

industry during this period has also grown rapidly if somewhat erratically.[327] The employment practices of the air transportation industry are of special interest because of its growth pattern, the high visibility of its employees, and the low entry-level skill requirements for many of its positions.

1. Equal Employment Opportunity - The Industry Record

The air transportation industry is characterized by a large number of different crafts and occupations with a wide range of skill requirements and entry levels.[328] Some positions, such as the ramp

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327/ Between 1947 and 1957, employment in the industry increased from 82,000 to over 148,000 workers. By 1966, total industry employment had reached 231,543 and by 1969 had increased by another 90,000 to 326,517. A decrease in employment of 60,739 was experienced by the airlines from 1969 to 1971 for a total employment of 265,778. Data on total and minority employment in the airlines was provided in 1971 by the Federal Aviation Administration (FAA) in response to a request from this Commission.

328/ Over 80 percent of the work force is in five distinctive occupational clusters:

Aircraft and Traffic Service	25.9 percent
Agents	21.2 percent
Maintenance (almost all mechanics)	20.6 percent
Pilots	8.1 percent
Flight Attendants	6.3 percent

The remaining personnel are situated in such diverse occupations as flight engineers, porters, guards, communications, and various management positions. American Foundation on Automation and Employment, Inc., Climbing the Job Ladder: A Study of Employee Advancement in Eleven Industries 80 (1970).

service assistant, have few prerequisites. Others, such as cabin flight attendants have rigid personal standards, but require little previous experience or training. Still others, such as pilots, have high skill and experience requirements. Wages in the airline industry as a whole are on a par with or generally above those in other industries.[329] In addition to the usual fringe benefits, the airlines also offer reduced fare travel for all employees and their families.

Although the air transportation industry is experiencing an economic slowdown presently, total employment in the industry more than doubled from 1958 to 1970. Minority group members and women however, have not shared equally in the industry's employment opportunities. In 1971, overall participation by minorities was minimal and they were concentrated in the lower paying occupations which have

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329/ According to the Air Transport Association, the 1970 average wage was $205 per week. Telephone interview with Maxine Phillip, Research Assistant, Air Transport Association, June 5, 1974. This compares with an average wage for all industries in September 1970 of $121 per week. Rogers, supra note 326.

limited promotion opportunities.[330] Minorities constituted 9.5 percent of the industry's total employment. The majority of these employees, or approximately 63 percent, were in the operative, laborer, and service worker categories.[331] Employment of minorities in upper level white-collar jobs was negligible, with only 2.8 percent of officials and

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330 / Progression occurs almost exclusively within each of the occupational clusters because of the nontransferable nature of the job skills. The following are generalized lines of progression for the occupational clusters. (Primary entry-level positions are capitalized. The final listing in each category also is a first line management position.)

Pilots
2ND OFFICER
1st Officer
Senior Pilot
Executive Pilot

Flight Attendants
FLIGHT ATTENDANT TRAINEE
Senior Flight Attendant
Purser

Aircraft and Traffic Service

AIRCRAFT CLEANER or
Utility Man
Lead Man
Foreman

Agents
AGENT
Lead Agent
Senior Reservation Clerk
Supervising Agent

Maintenance

APPRENTICE MECHANIC
Line Mechanic
Inspector
Lead Mechanic or Lead Inspector
Inspector

Rogers, supra note 326.

331/ Minority employees constituted 17 percent of service workers, 34.8 percent of laborers, and 11 percent of operatives. The 1971 figures on air carrier employment supplied by FAA (see note 331. supra) refer only to all minorities and were not broken down into various categories of minorities, such as black, Asian American, or persons of Spanish speaking background.

managers, 2 percent of professionals, and 5 percent of technicians being minorities.[332/]

Another important indicator of minority underutilization in the industry is that only 8 percent of salesworkers were minority group members. This category[333/] includes flight attendants, a position which requires neither a high degree of skill nor experience. The minority representation in this category is obviously unreasonably low because the pool of minority applicants who could qualify for this position is larger than many of the other job categories in which the industry shows low minority participation.[334/]

In no other category of employment is the underrepres tation of minorities more evident than in the pilot classification. In 1971, the major airlines employed a total of 33,827 flight deck officers, a

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332/ Id. The near exclusion of minorities from these higher paying jobs has often been attributed to the lack of available methods of transportation to the suburban airports. Rogers, supra note 326. However, the fact that over 50 percent of the laborers and service workers in the industry are black or Spanish surnamed and are able to reach the airport appears to contradict this reasoning.

333/ The salesworker category also includes the positions of agent, customer service representative, ground attendant, and sales representative.

334/ This is true because the airlines conduct their own training and generally require no prior schooling other than a high school education. Further, since the public probably has more contact with attendants than with any other airline employees, it would seem that this is one of the most crucial areas for minority recruitment if the image of the airlines as a "white only" industry is to be erased.

category which includes pilots and flight engineers. Of these, only 275 or less than 1 percent were minority group members.[335/]

The primary source of pilots is the military. As of June 30, 1971, there were 1,007 minority pilots in all branches of the armed forces, of whom 839 were black.[336/] Further, while there are few minority pilots in the military, even fewer seem to be leaving the service. Less than 1 percent of all pilots separated from the military between 1966 and 1971 were minority group members.[337/] The airlines have taken little action on their own to increase the number of minority pilots employed and there seems no prospect of any significant improvement in the near future. The unwillingness of the airlines to take any affirmative action to employ minority pilots stems in part from the threat of the Air Line Pilots Association (ALPA) to strike if any

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335/ Of the 275 minority flight deck officers, 65 were black, 145 were of Spanish speaking background, 30 were Asian American, and 35 were American Indians. This data was provided by the Federal Aviation Administration upon a request from this Commission.

336/ Until recently, the Department of Defense recorded information only on blacks and other minorities (American Indian, Hawaiian, and Asian Americans). It classified Spanish speaking personnel as Caucasian. Letter from L. Howard Bennett, Acting Deputy Assistant Secretary (Equal Opportunity), Department of Defense, to Jeffrey M. Miller, Chief, Federal Evaluation Division, U.S. Commission on Civil Rights, Oct. 4, 1971, and interview with Major John C. Fernandez, Office of the Deputy Assistant Secretary of Defense for Equal Opportunity, June 4, 1973.

337/ The information was supplied by the Air Force, Army, and Marine Corps. The Navy did not provide data on the number of minority pilots separated from the service. Id.

pilot is employed outside the seniority list.[338]

Employment of women in the air transportation industry has been confined almost exclusively to the sales, customer service, and clerical categories. Although there were nearly 60,000 women employed by the six largest airlines in 1970, approximately 57,000 of them were in these categories and had no significant opportunity for upward mobility within their organizations.[339] Women are virtually excluded from the occupational clusters of pilots, maintenance, and aircraft and traffic service because the training requirements for the positions result in the military's being the primary recruitment source.[340]

338/ Even though the president of ALPA acknowledged that in the past the air transport industry had discriminated against black pilots, he stated that ALPA would close the airline industry down before it would allow anyone (minority or otherwise) to be placed above a pilot already on their seniority list. He acknowledged that since all but two of the major airlines had pilots on furlough, it would be impossible for the remainder of the airlines to employ additional minority group pilots in the immediate future. Interview with Captain J.J. O'Donnell, President, Air Line Pilots Association, Feb. 18, 1971.

339/ Comments of the Office of Communication of the United Church of Christ, Barbara W. McCall and the National Organization for Women to the Civil Aeronautics Board in Support of Proposed Rule Making, September 1972.

340/ Line mechanics must have at least 4 years experience in the field and must be licensed by the Federal Aviation Administration. Those mechanics who work in the overhaul shop or on ground equipment do not need a license, but such jobs generally require 18 months of experience in airframe or power plant work, often acquired in the armed services. These occupations comprise 46.5 percent of total airline employment. Most of these positions are salaried at a considerably higher level than those for which women compete. Rogers, supra note 326.

Women also face unique employment problems as cabin flight attendants. The job of cabin attendant requires patience, good judgment, and stamina. Although sex is unrelated to those requirements, the airlines,[341/] until recently, generally restricted this position to females. In addition, female cabin attendants have traditionally been subjected to requirements and restrictions not applied to male in-flight personnel. EEOC has found that the rules of major airlines discriminate against women.[342/] Charges of discrimination have also

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341/ On February 21, 1968, EEOC, after public hearings, held that sex is not a bona fide occupational qualification for the position of flight cabin attendant. EEOC concluded that the basic duties of an attendant can be satisfactorily performed by members of both sexes. In April 1971, the Fifth U.S. Circuit Court of Appeals in reaching a similar conclusion stated "...discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively....Pan Am cannot exclude all males simply because most males may not perform adequately." Celio Diaz, Jr. v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

342/ In June Dodd v. American Airlines, Inc., Case No. 6-6-5762, June 20, 1968, EEOC found reasonable cause to believe that American Airlines had violated Title VII in terminating a stewardess who had reached the airline's maximum age limitation for stewardesses. In Christina J. Neal v. American Airlines, Inc., Case No. 6-6-5759, June 20, 1968, EEOC determined that the policy of terminating stewardesses for reasons of marriage was a violation of Title VII.

been the basis of litigation by female cabin attendants with respect to compensation, job classification schemes, and employment conditions.[343/] A November 1973 decision by a U.S. district court found Northwest Airlines, the Nation's seventh largest airline, guilty of wide-ranging and long-standing discrimination against female cabin attendants because of their sex.[344/] The opinion held several specific Northwest regulations aimed at women in violation of the Civil Rights Act. For example, only women employees were forced to undergo periodic weight checks, and male flight attendants were allowed to wear glasses while female flight attendants could wear only contact lenses. The ruling is the broadest in the series of such actions which have been brought against airlines, and could ultimately affect all airline regulations for female employees.

343/ For example, a multi-million dollar suit alleging sex discrimination was filed in 1970 by Trans World Airlines' stewardesses against the airline. The suit accused TWA of violating the Equal Pay Act of 1963 and the Civil Rights Act of 1964 by maintaining different wage scales for male and female employees who perform basically the same job. Margaret M. Maguire v. Trans World Airlines, 70 Civ. 3947 (S.D.N.Y. 1970).

344/ The complainants had contended that the airline purposely named only men to the higher-paying job of purser, while they performed the same duties as female attendants. The court ruled that this higher rate represented a "willful violation" of Federal equal pay and civil rights laws. Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.C.D.C. 1973). The ruling could mean retroactive pay increases of up to $250 a month for as many as 1,800 Northwest stewardesses.

The Department of Justice has also filed complaints against two of the three largest U.S. air carriers--United and Delta Airlines--charging both racial and sex discrimination.[345] On April 16, 1973, Delta Airlines settled the suit with an out-of-court agreement which included back pay to the first 1,000 employees who transfer to new jobs.[346] One of the Government's charges in United States v. United Airlines was that the five unions which represented the airlines' employees had entered into discriminatory collective bargaining agreements.[347]

345/ In United States v. Delta Air Lines, Inc. (Consent decree N.D. Ga. Apr. 27, 1973) the complaint stated that "Delta traditionally has assigned, and continues to assign, white persons and male persons to jobs which offer better opportunities for training and advancement." The Government charged in United States v. United Airlines, Inc. (N.D. Ill. Complaint filed Apr. 17, 1973) that the company had similarly discriminated against black and female employees in its hiring and promotion policies.

346/ The back pay is designed to serve as compensation because transfers and promotions had previously been denied to these workers.

347/ The five unions involved in the complaint were the International Association of Machinists and Aerospace Workers, the Air Line Pilots Association, the Communication Workers of America, the Transport Workers Union of America AFL-CIO, and the Air Line Employees Association International. The collective bargaining agreements, according to the complaint, contained provisions for promotion, demotion, transfer, and layoff based on job seniority, which discriminated against black employees because of their race and female employees because of their sex.

Equal Employment Rules

This Commission recommended in 1970 that CAB take action to ensure that equal employment practices prevail in the air transportation industry.[348] CAB also received communications from other organizations advocating the adoption of equal employment guidelines.[349] Subsequently, on August 3, 1972,[350] CAB issued an ad-

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348/ Enforcement Effort report, supra note 247, at 276-277. The Commission reiterated this position in followup studies of the civil rights programs of over 30 Federal agencies in One Year Later report, supra note 247, at 178, and Reassessment report, supra note 247, at 409.

349/ The Chairman of the Equal Employment Opportunity Commission in a letter to the Chairman of CAB, urged the Board to condition awards of operating authority or other benefits to carriers upon compliance by the carriers with the national policy, set out in Title VII of the Civil Rights Act of 1964 and proclaimed by the President, to eliminate discrimination in employment and ensure equal employment opportunity for all citizens. A group of students at the George Washington University Law School, styling themselves as Future Lawyers Investigating Transportation Employment (FLITE), filed a petition on December 22, 1970, asking the Board to issue a rule under which the agency, before awarding a route or approving a merger, would evaluate the applicant's hiring practices to determine if they are in accordance with the policy of racial equality in employment.

350/ In April 1971, CAB indicated that a draft of the advance notice of proposed rulemaking was nearing completion and would be issued by May 1, 1971. CAB Response to U.S. Commission on Civil Rights Questionnaire, Apr. 19, 1971. However, by October 1971, CAB had not yet issued the advance notice. CAB stated that the complexity and sensitivity of the subject and problems of internal administration were responsible for the delay. The advance notice, however, CAB reported, would be released in 2 weeks. CAB Response to U.S. Commission on Civil Rights Questionnaire, Oct. 12, 1971. Ultimately, in August 1972, CAB issued the advance notice of proposed rulemaking.

vance notice of proposed rulemaking to consider whether it should establish rules regarding racial, sex, religious, and ethnic discrimination in airline employment practices. Ordinarily, in rulemaking proceedings, CAB publishes a notice containing proposed rules or statements of policy in regulatory format and issues final rules after receiving comments. In this case, the agency chose to take the additional step of publishing an advance notice which has greatly delayed the promulgation of a proposed rule.[351/]

Comments on the advance notice were submitted by September 25, 1972, and staff attorneys in CAB's Office of General Counsel analyzed the public comments.[352/] By June 1, 1974, almost 2 years after the issuance of the advance notice, CAB had not yet reached a decision on whether it would issue a notice of proposed rules. In fact, CAB indicates that it is unable to speculate on

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351/ The Board explained this step was necessary because the issue is regarded as both important and novel to its experience and expressed the need for further preliminary information and comments in order to formulate rules or policy statements properly. CAB, Explanatory Statement, Advanced Notice of Proposed Rule Making, July 27, 1972.

352/ CAB Response to the U.S. Commission on Civil Rights Questionnaire, June 11, 1973 /hereinafter referred to as CAB response/.

when the question will be resolved.[353] CAB states that the delay in reaching a decision results from the "difficult and controversial issues of law and fact" raised by the inquiry and that "extensive analysis and deliberation are necessarily involved before the Board can arrive at a sound decision."[354] There does not appear to be any question of fact or law presented, however, which justifies a 2-year delay in reaching a determination.

353/ CAB's Deputy General Counsel would not state the stage to which the rulemaking had advanced, indicating that it was general policy not to inform anyone of the stage of rulemakings. Interview with Oral Ozment, Deputy General Counsel, Civil Aeronautics Board, June 21, 1973.

354/ CAB response, supra note 352. For an evaluation of the legal and related issues involved in the institution of equal employment rules by the regulatory agencies, see Section IA supra. The Board pointed out in a recent letter to this Commission that the issue of whether the FPC may properly refuse to adopt a rule prohibiting its regulatees from discriminating in their employment practices is now before the U.S. Circuit Court of Appeals for the District of Columbia. NAACP v. FPC, No. 72-1959 (C.A.D.C.). It is CAB's position that:

> In the expectation that the court's disposition of the Power Commission case would be particularly helpful, if not dispositive, in resolving the fundamental legal issue in our rulemaking proceeding, the Board postponed decision in that proceeding pending the court's decision. This, we think, was an entirely responsible, indeed appropriate, approach. To be sure, the passage of a year since oral argument without decision by the court was not anticipated. In our opinion, however, the very fact that so much time has passed without a decision by the court confirms the Board's view that the legal issue is difficult and refutes the contrary suggestion implicit in the draft report.

Letter from Whitney Gillilland, Acting Chairman, CAB, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Oct. 3, 1974.

D. Federal Power Commission

The Federal Power Commission is charged with regulating, in the public interest, the interstate aspects of the electric power and natural gas industries. FPC administers its responsibilities under the authority of two basic statutes, the Federal Power Act and the Natural Gas Act. 355/

FPC licenses the non-federally-owned hydroelectric projects which use the water power of the Nation's streams. The projects must meet the agency's standards of operation, which include a requirement that developed recreational facilities be at project sites. 356/ Electric companies under FPC jurisdiction 357/ may not sell, lease, or otherwise dispose of their major facilities without FPC authorization.

Companies which transport or sell natural gas, or undertake to construct or extend facilities, are required to secure certificates of public convenience and necessity from FPC authorizing

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355/ The Federal Power Act (16 U.S.C. § 791a-825r) was originally enacted as the Federal Water Power Act of June 10, 1920 (41 Stat. 1063) and subsequently amended by Title II of the Public Utility Act of 1935 (49 Stat 838). The Natural Gas Act was enacted June 21, 1938 (52 Stat. 821-833, as amended; 15 U.S.C. § 717-717W). Additional responsibilities have been assigned by other legislation and by Executive order.

356/ For a discussion of FPC's regulations enacted to ensure the public's nondiscriminatory access to recreational facilities, see Section IIC infra.

357/ FPC does not have regulatory authority over the interstate operations of publicly-owned systems or cooperatively-owned utilities. In general, FPC has no jurisdiction over retail electric service or over the facilities used solely for such service. These operations are subject to regulation under State laws.

their operations.[358] In addition, natural gas companies may not abandon any of their facilities or any service rendered by means of facilities subject to FPC's jurisdiction unless FPC gives its approval. FPC's regulatory mandate also extends to the rates of interstate wholesale transactions in electric power and natural gas.

Although the gas industry is the Nation's oldest public utility, it did not experience rapid growth until after the Second World War. Between 1945 and 1967, America's total gas supply increased 410 percent, the number of gas customers increased 95 percent, and the miles of distribution gas pipeline increased 168 percent.[359] Today FPC has jurisdiction over more than 120 natural gas pipeline companies, 66 of which have operating revenues of $2.5 million or more.[360]

The electric industry has experienced a long period of uninterrupted growth since early in the twentieth century. By 1968, sales of electric energy by utilities reached 1,105 billion kilowatt hours and revenues

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358 / The natural gas industry is divided into three distinct segments; the producing companies, the transmission pipeline companies, and the local gas distributors. There are approximately 4,500 independent gas producers supplying the interstate market, 120 interstate natural gas pipeline companies, and 1,700 local gas distributor systems. FPC has no jurisdiction over production or local distribution operations, but does have the authority to determine wholesale rates for interstate commerce. Gas distributors are usually subject to State or local regulation.

359 / B.E. Anderson, Negro Employment in Public Utilities 38 (1970).

360 / FPC, Statistics of Interstate Natural Gas Pipeline Companies (1970).

totaled $19.4 billion. FPC lists 400 investor owned electric utilities under its jurisdiction.[361]

1. Equal Employment Opportunity--The Industry Record

The electric and gas utility industry offers significant employment opportunities.[362] The industry is characterized by relatively high pay (particularly in the blue-collar field),[363] stability of employment, and the large size of the employers. The level of training and skills required for initial hire in most nonprofessional jobs is low. Training usually occurs in the entry-level job, with on-the-job training heavily utilized. Consequently, higher level positions are usually filled by promotions within the employment structure.[364] The nature of the skills required in the industry and the dependence on inhouse training indicate that the opportunities for the employment and upward mobility of minority and female employees are greater than in other industries.[365]

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361 / FPC, Statistics of Privately Owned Electric Utilities in the United States (1969).

362/ The Bureau of the Census listed 634,000 jobs in the industry in 1970, with 285,000 in electric companies and systems, 162,000 in gas companies, and 187,000 in combination companies and systems. U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 221 (1971).

363 / Of the blue-collar workers in the industry, 60 percent are craftsmen with an average hourly wage of $4.67. Operatives (semiskilled) comprise 11 percent of the blue-collar work force and earn an average of $3.95 an hour; laborers constitute 15 percent with an average wage of $3.98 an hour, and service workers, who comprise 4 percent, have an average wage of $2.91 an hour. In addition, 10 percent of the clerical workers are classified as blue collar by the Bureau of Labor Statistics (meter readers and stock clerks) and they average $3.05 an hour. Id.

364 / Robinson, Occupations in the Gas and Electric Utilities Industry (April 1970), published by the Equal Employment Opportunity Commission.

365 / A.G. Thomas, Employment Patterns in the Gas and Electric Industries (November 1971), published by the Equal Employment Opportunity Commission.

The utilities industry, however, has thus far failed to provide equal employment opportunity for minorities and women. The Equal Employment Opportunity Commission, using data aggregated from its 1970 EEO-1 reports,[366] ranked the electric and gas industry as last of all major industries in the employment of blacks.[367] Total black participation in the utilities industry was 6.1 percent in 1970, in comparison to the 10.1 percent average for all industries.[368]

Black employees represented 7 percent of the industry's blue-collar work force but were concentrated in the laborer and operative categories.[369] While the overall industry participation rate for black workers was strikingly low, the statistics on white-collar employment were even more distressing. Less than 4 percent of all white-collar workers were black and 80 percent of these were office and clerical workers. Further, less

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366/ The data covered 86 percent of the total employment in the industry and covered three types of utilities: those classified as electric companies or systems; those classified as gas companies or systems; and those providing electric or gas services in combination with other services. Id.

367/ EEOC tabulated the percentage of black employment in industry groups reporting 500,000 or more employees. The agency found a range of from 6.1 to 15.9 percent black participation in the 23 major industries. Overall black participation in the utilities industry has increased slightly in the last 6 years; however, EEOC attributes this to increases which occurred in the lower paying, less prestigious office and clerical job category. Id.

368/ One-third of all the utility establishments filing EEO-1 reports with EEOC in 1970 had no black employees. In only 3 of 20 large Standard Metropolitan Statistical Areas (SMSA's) did the black participation rate approach or exceed the participation rate for all industries in the area. In 8 of 20 SMSA's, the all-industry black participation rate was at least double the black participation rate in local utilities. EEOC, Promise vs. Performance, A study of Equal Employment Opportunity in the Nation's Electric and Gas Utilities iii (June 1972).

369/ Blacks are 26 percent of the industry's laborers, 18 percent of operatives, and only 3 percent of the craftsmen. Id.

than 1 percent of the industry's 105,000 officials, managers, and professionals were black.

Other minority group members and women have been similarly underutilized and underrepresented in the utilities industry. Persons of Spanish speaking background held only 1.6 percent of all jobs in the industry [370/] and were also relegated to the lower level blue-collar jobs. [371/] They held only 1.4 percent of the white-collar positions and 67 percent of these were office and clerical jobs. Less than 1 percent of the official, managerial, and sales positions were held by employees of Spanish speaking background. The industry has a blue-collar work force that is 1.9 percent Spanish surnamed, as compared to a 4.9 percent national figure for all industries. [372/]

The employment patterns of women in the utilities industry are reflective of their underutilization and discriminatory occupational placement. Although women constitute over half of the total population

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370/ Spanish surnamed Americans held 3.6 percent of all jobs covered in the 1970 survey of employment patterns of major industries. Id.

371/ Id.

372/ In many SMSA's Spanish surnamed Americans have relatively low participation rates in the utilities industry when compared to their participation rate for all industries in the local labor market. Most striking in this kind of comparison is the city of Chicago, where Spanish surnamed Americans held 0.4 percent of the jobs in the gas and electric utilities at the same time that they held approximately 5 percent of all jobs in the Chicago area. Id.

and 38 percent of the labor force, they have a participation rate of only 14.8 percent in the gas and electric utility industry.[373] Women are concentrated in the lower level positions with 87.9 percent in office or clerical positions. Their participation in the upper level white-collar jobs is minimal.[374] Less than 2 percent hold the blue-collar positions which offer relatively high wages and opportunities for advancement.

The extent of the problem of employment discrimination in the electric and gas industry is also reflected in the number of lawsuits filed against utility companies. The Department of Justice has filed legal actions alleging widespread employment discrimination against several companies in the industry.[375] In Stamps v. Detroit Edison Co.,[376] for example, the company was charged with refusing employment to qualified blacks, consistently failing to promote black employees, and utilizing selection procedures which were discriminatory against black applicants. The Federal District Court in Michigan found the company guilty of intentional and systematic racial discrimination and, besides ordering it to implement corrective measures, awarded punitive damages of $4 million to all affected black individuals. A number of similar cases involving

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373/ Id.

374/ Women constitute 1.3 percent of officials and managers, 2.5 percent of professional workers, and 1.5 percent of technicians. Id.

375/ Griggs v. Duke Power Co., 401 U.S. 424 (1971); United States v. Georgia Power Co., 474 F. 2d 906 (5th Cir. 1973); United States v. VEPCO, 327 F. Supp. 1034 (E.D. Va. 1971); United States v. Piedmont Gas & Elec. Co. (Consent decree W.D.N.C. June 15, 1972); United States v. Louisville Gas & Elec. Co. (Consent decree W.D. Ky. June 30, 1972); United States v. Philadelphia Elec. Co., 351 F. Supp. 1394 (E.D. Pa. 1972); and United States v. New Orleans Pub. Serv. Inc. (E.D. La. Complaint filed May 17, 1973).

376/ Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E. D. Mich. 1973).

charges of racial, ethnic, and/or sex discrimination have been filed with State fair employment practices commissions. 377/

377/ Oklahoma - Investigations are pending in cases filed with the Oklahoma Human Rights Commission against the National Gas Pipeline Company (sex) and the Western Electric Company (sex and race).

Wisconsin - The Wisconsin Department of Industry, Labor and Human Relations lists three cases pending against utilities. All of the cases involve alleged racial discrimination.

West Virginia - The West Virginia Human Rights Commission is processing two cases against power companies, both of which are based on race discrimination.

District of Columbia - The District of Columbia Office of Human Rights has pending complaints on the basis of race, creed, color, national origin, and sex against electric and gas utilities, two against PEPCO and one against the Washington Gas Light Company.

New York - The State of New York's Division of Human Rights has three pending complaints, two against the Niagara Mohawk Power Corporation (race and national origin) and one against the N.Y. State Electric and Gas Corporation.

Washington - The Washington State Board Against Discrimination has a complaint pending against the Snohomish County Policy Utility District (race and sex).

California - The California Fair Employment Practices Commission has 15 cases pending against the City of Los Angeles Department of Water and Power (race and sex), four against the Southern California Edison Company (race), two against the Pacific Gas and Electric Company (race), and one against the Southern California Gas Company (race).

New Jersey - The New Jersey Department of Law and Public Safety's Division on Civil Rights lists several complaints pending against electric and gas utilities: against the Public Service Electric Company (national origin), against the Public Service Electric and Gas Company (eight on race and sex), against the New Jersey Natural Gas Company (multiple) and against the A. C. Electric Company (multiple).

Colorado - The Colorado Civil Rights Commission has two pending complaints on file against the Public Service Company of Colorado (race).

Kansas - The Kansas Commission on Civil Rights has two cases pending against the Kansas Gas and Electric Company (race).

Missouri - The Missouri Commission on Human Rights lists complaints pending against the Gas Service Company (race/color), against Western Electric (six on race and one on color), and against Union Electric (two on race/color, two on sex, and one on national origin).

Indiana - The Indiana Civil Rights Commission has cases pending against the Indiana Gas Co. (race), the Citizens Gas Co. (race), and the Indiana and Michigan Electric Co. (race).

The information on cases filed with State fair employment commissions was compiled by the National Association for the Advancement of Colored People and 11 other public interest groups in support of their petition before FPC for the issuance by that agency of equal employment rules covering utility companies. For a discussion of this petition, see pp. 134-37 infra.

2. Equal Employment Rules

The Federal Power Commission has consistently failed to acknowledge any responsibility for ensuring nondiscrimination in its regulatees' employment policies. In 1970, this Commission expressed the view that FPC had the authority and the obligation to prevent employment discrimination in the utilities industry.[378] At that time, proceedings were pending before FPC in which the California Rural Legal Assistance (CRLA) requested the denial of a license renewal to the Pacific Gas and Electric Company (PG&E) for allegedly utilizing discriminatory employment practices. Subsequently, FPC issued an order stating that it did not have a statutory basis for jurisdiction in the area of industry employment practices.[379]

In June 1972, the National Association for the Advancement of Colored People (NAACP) and 11 other public interest groups filed a petition with FPC requesting the initiation of action to promulgate regulations to assure equal

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378/ Enforcement Effort report, supra note 24/, at 276-277. See also One Year Later report, supra note 24/, at 182, and Reassessment report, supra note 247, at 411.

379/ On November 6, 1970, FPC issued an order stating that it did not "find that the issues raised by intervenor (CRLA) are sufficiently related to a legitimate regulatory purpose as expressed in the Federal Power Act that we can proceed as requested by CRLA." FPC Order in Project No. 2687, Nov. 6, 1970. Petitions to review FPC's order were filed by both CRLA and PG&E, however, both petitioners subsequently requested voluntary dismissal of the petitions. Letter from Gordon Gooch, General Counsel, FPC, to David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, Oct. 8, 1971.

opportunity in the employment practices of its regulatees.[380] FPC, however, denied the petition, again citing lack of jurisdiction as the basis for its opinion.[381] In reaching this decision, FPC rejected[382]

380/ The petition, Docket No. R-447, was initiated by:

National Association for the Advancement of Colored People
National Urban League
Mexican American Legal Defense and Education Fund
National Organization for Women
Women's Equity Action League
League of United Latin American Citizens
Association for the Betterment of Black Edison Employees
Office of Communication of the United Church of Christ
Center for Community Change
American GI Forum
Mexican American Political Association
United Native Americans, Inc.

It requested FPC to institute a vigorous equal job opportunity program to attack "rampant discrimination against blacks, women and Spanish surnamed Americans in the nation's gas and electric utility industry." The petitioners also requested FPC to adopt rules to require that all regulated companies:

(1) comply strictly with equal opportunity practices in the recruitment, hiring, and upgrading of workers.
(2) devise and put into effect affirmative action programs to eliminate barriers to fair employment.
(3) file statistical information on their equal opportunity performance with FPC.

381/ In Opinion No. 623, issued July 11, 1972, FPC held that it lacked the legal authority to promulgate equal employment opportunity regulations covering employment practices of those systems which it regulates, such as natural gas companies, public utilities, or licensees, because it lacks the requisite delegation of congressional authority to act in that area. FPC found that both the Federal Power Act and the Natural Gas Act were statutes founded on economic regulation with the primary purpose of assuring adequate service and just and reasonable prices for the consumers of the electric and gas utility industry. The opinion also noted that Congress has already acted with regard to ensuring equal employment opportunity.

382/ FPC indicated in Opinion No. 623, however, that if the court ultimately concludes that the agency possesses jurisdiction, it will "undertake the enforcement thereof as a matter of highest priority." Letter from Mary B. Kidd, Acting Secretary, FPC, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Sept. 27, 1974.

the opinions of the Department of Justice[383] and its own former Deputy General Counsel[384] that it has both the authority and duty to act against employment discrimination.

FPC's opinion was appealed by the petitioners and oral arguments before the U.S. Court of Appeals for the District of Columbia were heard on October 29, 1973.[385] The court's decision had not been handed down as of October 1, 1974.

II. Nondiscrimination in Services and Facilities

A. Interstate Commerce Commission

1. Civil Rights Responsibilities

In 1949, ICC issued regulations prohibiting discrimination in services or facilities offered by rail and motor carriers under its jurisdiction.[386] The regulations, which were based on the provision

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383/ On January 27, 1970, in relation to the CRLA petition, FPC requested the Justice Department's opinion on the question of FPC's jurisdiction over the employment practices of regulated companies. FPC issued a decision on the CRLA petition on November 6, 1970 (see note 133 supra for further details on FPC's decision). It was not until September 17, 1971, that the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice, in a letter to the General Counsel of FPC, held that FPC had clear authority to issue regulations barring employment discrimination in the companies it regulates. The opinion noted that another Federal regulatory agency, the Federal Communications Commission, had promulgated a rule prohibiting job discrimination by broadcasters subject to jurisdiction based upon considerations similar to those affecting FPC. Letter from David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice to Gordon Gooch, General Counsel, Federal Power Commission, Sept. 17, 1971. By the time it received this Justice Department response, FPC had already reached a contrary conclusion.

384/ As early as 1969, David J. Bardin, then Deputy General Counsel of FPC, recommended that FPC "should issue a notice of rule making, setting forth its intention to condition all licenses and certificates of public convenience and necessity to bar employment discrimination and to require non-discrimination clauses in major contracts relating to the construction or operation of FPC licensed or certificated facilities." Memorandum to the Chairman, Federal Power Commission, from David J. Bardin, Deputy General Counsel, Recommended Civil Rights Activity, Apr. 17, 1969. Mr. Bardin's recommendation was made public by the Civil Rights Oversight Subcommittee of the Committee on the Judiciary of the House of Representatives.

385/ NAACP v. FPC, No. 721959 (D. C. Cir. 1974).

386/ 49 C.F.R. § 1055.1-1055.6.

of the Interstate Commerce Act which prohibits the exercise of any undue discrimination,[387] proscribe the seating of passengers on motor vehicles and rail carriers based on race, color, creed, or national origin. This prohibition is required to be printed on all passenger tickets.

Terminal facilities provided by motor and rail carriers are also subject to the nondiscrimination regulations and must not be operated on a segregated basis. Further, a sign containing the full text of the nondiscrimination regulations must be displayed at these facilities. Although the rationale for prohibiting discrimination based on sex is identical to that for other forms of discrimination, ICC has not yet extended its regulations to include sex discrimination. Further, ICC's nondiscrimination regulations do not cover household good movers; thus, these carriers are covered only by the Interstate Commerce Act's general prohibition of discrimination. While ICC contends that sex discrimination by motor carriers of household goods is covered by the existing provisions of the Interstate Commerce Act which prohibit any undue or unreasonable preference, prejudice, or disadvantage by motor carriers against any particular person,[388]

387/ 49 U.S.C. § 3(1).

388/ ICC recently noted that:

> Existing provisions of the Interstate Commerce Act already cover the subject of discrimination in service and facilities. Section 216(d) of the Act prohibits undue or unreasonable preference, prejudice, or disadvantage by motor common carriers, including motor common carriers of household goods, against any particular person in any respect whatsoever. In addition, section 216(e) of the Act provides for the filing by any person or organization of a written complaint to this Commission for any violation of section 216. Moreover, comparable provisions exist in every other part of the Act with respect to other regulatees subject to the jurisdiction of this Commission. Stafford letter, supra note 308.

there does not appear to be any justification for ICC's failure to issue specific regulations banning all forms of sex discrimination by its regulatees, and racial, ethnic, or sex discrimination by movers.

2. Enforcement of Nondiscrimination Provisions

ICC relies principally upon the investigation of individual complaints to enforce its prohibitions against racial and national origin discrimination.[389] All complaints sent to ICC are handled by its Bureau of Operations, which is responsible for ensuring compliance by carriers with all applicable Federal laws and ICC regulations. The Bureau performs these functions through a field organization of six regional[390] and 72 area offices.

In June 1972, ICC issued revised complaint handling procedures.[391] The revisions were initiated as part of a project to computerize complaint information.[392] ICC developed a form, Action Log, to register the

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389/ ICC Response to U.S. Commission on Civil Rights Questionnaire, June 1, 1973 /hereinafter cited as ICC response/.

390/ The six regional offices are located in Boston, Mass.; Atlanta, Ga.; Philadelphia, Pa.; Chicago, Ill.; Ft. Worth, Tex.; and San Francisco, Cal. Interview with Robert Pfahler, Director, Bureau of Operations, ICC, June 12, 1973.

391/ ICC, Field Staff Manual, Part V, Sec. B-1.

392/ ICC is computerizing information on how complaints are handled, the time spent on each complaint, the disposition of each case, and the geographic distribution of the complaints to determine if any differences exist in the method of complaint handling and the disposition time for each regional office. Pfahler interview, supra note 390.

pertinent information on complaints. The Log recorded data on the complainant, the respondent, and the nature of the complaint. It listed 15 categories of possible service complaints; however, there was no provision for the specific identification of civil rights complaints and thus discrimination complaints were probably reported under the heading "other."[393] In September 1973, ICC issued a new reporting form which includes a category identified as "Civil Rights" to cover racial and ethnic discrimination complaints.[394]

Since the institution of the revised complaint procedures in June 1972 until June 1973, information was recorded on three complaints alleging racial discrimination in carrier services and facilities.[395] The complaints were filed against buslines and alleged: (1) the discriminatory operation of Greyhound terminal facilities; (2) the denial of seating by the Carolina Coach Company because of race; and (3) the removal from a Greyhound bus on the basis of race.[396] As with all complaints alleging violations of laws within ICC's jurisdiction, these complaints were subject to field review. Field reviews are conducted by ICC regional and area field office staff. They are

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393/ ICC Form BOp Field 30, June 1972.

394/ ICC Form BOp Field 30, Sept. 1973.

395/ This compares with ICC's receipt of 20,886 complaints in fiscal year 1973, the majority of which dealt with business, i.e., rate and tariff discrimination. Pfahler interview, supra note 390.

396/ In addition to those complaints which specifically alleged discrimination, ICC explored the possibility of discrimination in a complaint on failure to render service to a black customer. ICC investigation staff contacted the carrier's district office and the complainant was subsequently given a seat to his ticketed destination. ICC also received a complaint alleging sex discrimination with respect to carrier employment practices. A female employee of Greyhound Bus Lines charged that the company was planning to replace her with a male employee. Although carrier employment practices have not been recognized as coming under ICC jurisdiction, its staff looked into the complaint. ICC staff interviewed Greyhound officials and determined that no action had been taken by the company to replace the complainant. ICC response, supra note 389.

generally thorough and include interviews with complainants and other involved persons, and onsite visits to the location where the incident occurred.[397]

In the complaint alleging discriminatory terminal facilities, for example, the ICC investigator spent 4 days on the field review and interviewed the complainant, the Greyhound agent at the terminal, the company's sales manager, and its regional manager. On two separate occasions, the investigator observed activity at the facility without the knowledge of the company officials and reported minority utilization of the terminal.[398] The investigative reports reviewed by Commission staff provided a description of the method of investigation[399] and specific and detailed information on the investigator's observations and the interviews with involved parties.

Nevertheless, ICC's complaint handling guidelines do not specifically cover the conduct of civil rights investigations and no specific instructions in this regard have been issued. Further, no formal training on civil rights

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397 / ICC currently has a backlog of complaints which require field investigation. Although ICC did not have exact figures on the size of the backlog, the Ft. Worth region has 130 complaints awaiting investigation, some of which are more than 2 years old. ICC officials indicate that there are no civil rights complaints in the backlog. Further, it was indicated that any civil rights complaints received would be given a priority over consumer complaints for handling. Interview with James Berry, Regional Director, Ft. Worth Regional Office, ICC, June 27, 1973, in Ft. Worth, Tex.

398 / Memorandum from Floyd A. Johnson, District Supervisor, ICC, Memphis, Tenn., to James L. Haygood, Regional Director, ICC, Atlanta, Ga., Mar. 22, 1973.

399 / The standard procedure is for the field staff to prepare reports of their investigation which cite the facts of the case, the results of the interviews and onsite visits, and any other pertinent data. This report is kept at the field office with a copy sent to the Bureau of Operations in Washington. If the investigation upholds the allegations of the complaint and the Bureau is satisfied with the findings, the matter is referred to the Bureau of Enforcement for further action.

matters or complaint handling is provided to field investigators.[400]

In each case involving civil rights, the carrier was found to have a policy against discrimination. ICC additionally concluded that there was no evidence that the carriers' employees had discriminated against the complainants and that conflicts in the facts of the incident which led to the allegation of discrimination could not be resolved. It would appear that there is difficulty in establishing discrimination in complaints against carriers because there is generally no evidence other than the contradictory statements of the involved parties and no possibility of identifying witnesses to the incident.[401/] ICC, nonetheless, believes that its investigations had a beneficial effect by demonstrating to the carriers continued ICC concern and emphasizing the importance of its antidiscrimination program.[402/]

Within the last 3 years, ICC has initiated several public information programs to inform consumers of their rights in dealings with household goods movers. Partially as a result of this effort most consumer complaints received by ICC concern these carriers. ICC also requires these carriers to provide each

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400/ Staff conferences of 2 to 3 days duration had previously been held yearly on ICC programs and policies, but have not been held for 3 years. The training of field investigators consists solely of on-the-job experience. Pfahler interview, supra note 390.

401/ For example, an individual who wishes to complain about a discriminatory incident on a bus will probably be unable to find any witnesses, since no passenger lists are maintained by buslines.

402/ ICC response, supra note 389.

customer with a publication entitled "People On the Move." The brochure explains some of the regulations with which household good movers are required to comply. Part of the brochure consists of a questionnaire which consumers are requested to return to ICC at the completion of their move. The questionnaire asks the consumer to answer several questions about the services provided by the carrier, the conditions of the move, and the fairness of the rate charges.[403] Other than a general inquiry as to the consumer's satisfaction with the move, the questionnaire does not offer any opportunity for the individual to identify if he or she feels discriminatory services or treatment were afforded. Yet there is a real possibility that minority group members may suffer from the reluctance of carriers to provide services to inner-city areas which are considered dangerous, i.e., congested streets and high crime rates. Further, ICC has not initiated any publicity efforts to inform minority group members and women of their right to nondiscriminatory motor and rail carrier services and facilities.[404]

In addition to complaint handling, the field offices conduct reviews of carrier files at the principal or terminal office to check for violations of

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403/ The data provided by the questionnaire is computerized and is utilized as an indicator of the carriers' level of compliance with ICC regulations. If a carrier is cited often for unsatisfactory service, regional or field area staff will conduct a compliance survey of the carrier to determine the reasons for the complaints. Berry interview, supra note 398.

404/ ICC response, supra note 389.

ICC statutes.[405] ICC's Uniform System of Accounting requires carriers to maintain certain files concerning adherence with economic regulations but no information on compliance with ICC's nondiscrimination provisions is required to be kept. Although ICC assumes most companies maintain complaint files, the agency has not made such a policy mandatory.[406]

The compliance surveys are conducted according to guidelines developed by ICC.[407] The guidelines specify the areas of possible violations of ICC regulations which must be examined. An inspection of compliance with ICC regulations governing discrimination is included in the compliance survey, but is limited to a review of the requirements for printing the notice of nondiscriminatory seating upon every ticket and for posting a sign at facilities detailing the nondiscrimination regulations.[408] The guidelines do not require field investigators to survey carrier complaint files to ascertain if any discrimination complaints have been received by the carrier.[409]

Findings of surveys are reported on an ICC form (BOp Field 4) which lists general information on the carrier's operation. The report also records specific findings of violations of ICC regulations and the number

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405/ Each field office is responsible for monitoring the compliance of carriers which are operating or domiciled in its area.

406/ Pfahler interview, supra note 390.

407/ ICC Field Staff Manual, Part III, Sec. P-I, Feb. 20, 1970.

408/ Id.

409/ Pfahler interview, supra note 390 and Berry interview, supra note 389.

of violations discovered.[410] In compliance reports reviewed by staff of this Commission, violations were frequently cited. Some examples of violations noted were inaccurate reporting on bills of lading, transporting an unauthorized commodity, failure to collect freight charges within prescribed time limit, and failure to keep prescribed records of shipments. ICC indicates that if any violations involving civil rights were revealed in the compliance survey process, the matter would be afforded a separate investigation.[411] As of December 1, 1973, however, ICC had not received any such report from its surveys.[412]

Regional directors and field staff members are authorized to determine the selection of carriers for surveys. ICC does recommend, however, that when a complaint or information suggesting possible violations--for example, information from complaint log reports or material submitted from various State enforcement agencies--is received, the carrier should be scheduled for a survey.[413] The surveys may be limited in scope, covering only the specific area of relevance to the complaint.

410/ The surveys are submitted to the regional director who reviews them for adequacy and possible recommendations for ICC enforcement action. Upon completion of the review process, the carrier is informed of the findings and advised to correct the deficiencies. If the carrier does not initiate corrective measures, the case is referred to the Office of General Counsel for the initiation of legal action against the carrier. Field Staff Manual, supra note 391.

411/ Berry interview, supra note 398

412/ In fiscal year 1973, ICC conducted 1,400 motor carrier and 450 rail carrier compliances reviews. Pfahler interview, supra note 390.

413/ Id. ICC staff at the Ft. Worth Regional Office indicated that Class I carriers (those with gross revenues over $1 million) were reviewed at least once every 3 years. Berry interview, supra note 398.

B. Civil Aeronautics Board

1. Civil Rights Responsibilities

The Federal Aviation Act prohibits any form of discrimination in the operation of air carriers.[414] This prohibition has been interpreted by CAB[415] and by the courts[416] to also prohibit racial and ethnic discrimination. However, unlike the other regulatory agencies, CAB has not promulgated specific regulations to implement the civil rights aspects of the nondiscrimination

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414/ The Federal Aviation Act provides that:

> No air carrier or foreign air carrier shall make, give, or cause any undue preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsover or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. 49 U.S.C. § 1374(b) (1970).

415/ CAB, Office of General Counsel, Opinion No. 239, July 30, 1959. The opinion deals only with racial discrimination; however, CAB officials indicate sex discrimination would similarly be covered. Telephone interview with William Gingery, Chief, Bureau of Enforcement, CAB, June 5, 1974.

416/ In Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956), the court stated that section 404(b) of the Civil Aeronautics Act of 1938, which prohibited air carriers from practicing discrimination, barred the provision of "separate but equal" facilities for different races. The courts extended this prohibition to include airport facilities not under the control of the air carrier in United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962).

prohibitions nor has it formally communicated its policy to the air carriers.[417] Further, the agency has not instituted a comprehensive affirmative program to ensure nondiscriminatory air carrier services. It is CAB's position that discrimination in airline services is not a significant problem, and, therefore, there exists no need for any affirmative activity upon its part.[418] In fact, CAB believes that the airline industry is "remarkably free of discrimination."[419]

The agency conducts yearly audits of all certificated air carriers to monitor compliance with CAB regulations.[420] The audits include the major facets of the carriers' operations but do not cover carrier complaint files or any other area of potential civil rights impact.[421] In fact, CAB does not require airlines to maintain complaint files.[422]

CAB does require agency personnel on official travel to report if any

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417/ Gingery interview, supra note 415.

418/ CAB indicated that this determination was based on the paucity of discrimination complaints received by the agency in proportion to the number of consumer complaints filed. CAB states that, considering the small number of civil rights complaints, there is no need for general regulatory action. CAB response, supra note 352.

419/ CAB's position was initially stated in its April 19, 1971, response to a questionnaire from this Commission. CAB reiterated this view in August 7, 1972, and June 11, 1973, responses to further inquiries from this Commission.

420/ Interview with William Gingery, Chief, Bureau of Enforcement, CAB, Dec. 14, 1973.

421/ Id.

422/ In 1971, CAB initiated a rulemaking proceeding to consider the adoption of a uniform reporting system of statistics with respect to consumer complaints received by the carriers and to provide for the retention of data used in the preparation of such reports. The uniform reporting was proposed in order to enable CAB, the carriers, and other interested parties and groups to keep informed of trends in consumer complaints, to become aware of problem areas, and to compare the experiences of individual carriers in a meaningful manner. CAB, however, terminated the rulemaking in April 1973 because of the burden such a system would place on both the carrier and the agency. Notice of Proposed Rule Making, SPDR-23, May 27, 1971 and Termination of Rulemaking proceeding, Apr. 2, 1973.

incident or practice is observed.[423] The agency classifies these reports as field reviews. There is some doubt, however, that staff members can be cognizant of individual cases of mistreatment in a large aircraft or at ground facilities with disparate types of services.

In addition to CAB's nondiscrimination prohibitions, any carrier which receives subsidies[424] from the agency is also subject to the provisions of Title VI[425] of the Civil Rights Act of 1964.[426] In

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423/CAB staff are required to fill out Form 146--Traveler's Report on Field Review--for each trip. For a discussion of these reports, see Section IIB2b infra.

424/Subsidies are provided to air carriers to allow them to provide air service to localities where operations otherwise would not be profitable. The number of carriers receiving subsidies has grown progressively smaller over the last few years. However, the current energy crisis and ensuing high fuel prices may force many of the large carriers to apply for subsidies.

425/ Title VI of the Civil Rights Act of 1964 provides that no person in the United States shall on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

426/ When Title VI was passed, it was the opinion of some in the General Counsel's Office of CAB that this program did not constitute Federal financial assistance, since the subsidy is paid to the carrier in order for the carrier to continue to perform a public service. The problem was never finally resolved, but the importance of the issue was diminished by the fact that Section 404(b) of the Federal Aviation Act also prohibits discrimination by all air carriers. That act provides wider enforcement powers to CAB and to the prospective customer in enforcing his or her rights than Title VI.

fiscal year 1973, 13 air carriers[427] received approximately $72.2 million in subsidy payments from CAB.[428] CAB's Title VI regulations require each applicant under the subsidy program to file an assurance that it will comply with the nondiscrimination prohibitions.[429] Further, on the last day of every month in which a subsidy is received, the carrier must submit a financial report which includes a statement of compliance with the Title VI

427/ Hughes Air West Corp.; Allegheny Airlines, Inc.; Frontier Airlines, Inc.; Mohawk Airlines; North Central Airlines; Ozark Airlines, Inc.; Piedmont Aviation, Inc.; Southern Airways, Inc.; Texas International Airlines, Inc.; Alaska Airlines, Inc.; Kodiak Airways, Inc.; Western Alaska Airlines, Inc.; Wien Consolidated Airlines, Inc. CAB response, supra note 352.

428/ 14 C.F.R. § 379.1-379.12. These regulations were adopted in 1964 and were patterned after the Title VI regulations of the Department of Health, Education, and Welfare.

429/ The assurance consists of a statement to be signed by the carrier's officers included in the carrier's Claim for Subsidy:

> I certify that the above claim is correct and just and that supporting data, subsidy eligible stations and flight destinations and mileages employed are all in accord with current Certificate or Exemption Authority and or other officially designated standards issued or authorized by the C.A.B. During the period covered by this claim the carrier has complied with Part 379 of the C.A.B. Regulations and furnishes assurance that said compliance will continue. (Emphasis added.) CAB Form 545 VI (July 1972).

regulations.[430] Although the regulations empower CAB to conduct compliance reviews to determine if air carriers are providing nondiscriminatory service, the agency has not initiated any such reviews. As with all certificated carriers, the subsidized carriers are audited annually; however, Title VI compliance is not included as part of the inquiry. Observation reports of CAB staff on official travel are also submitted for flights on subsidized carriers. The majority of the trips, however, are on the large airlines as opposed to the local services carriers.[431] Subsidized air carriers are required to apprise the public of the protections afforded by Title VI to the "the extent that the Board finds it necessary."[432] However, as of November 1973, CAB had not imposed any requirements on carriers to publicize the nondiscrimination prohibitions or the availability of complaint procedures.[433]

On July 15, 1973, various amendments to CAB's Title VI regulations were adopted.[434] The most significant of these changes dealt with the possible effects of discriminatory employment practices on the provision of services by carriers. The amendment prohibits discriminatory employment practices to the extent necessary to assure

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430/ The wording in the financial statement, Air Carrier's Claim for Mail Pay Other than Service Mail Pay, is substantially the same as that in the Claim for Subsidy.

431/ Gingery interview, supra note 420.

432/ 14 C.F.R. § 379.5(c).

433/ CAB response, supra note 352.

434/ The amendments were adopted by CAB pursuant to recommendations of the Interagency Committee for Uniform Title VI Regulation Amendments, which was created by the Attorney General who, under Executive Order 11247, was assigned the responsibility for coordinating the enforcement of Title VI. (FR Doc. 73-13294). Id.

nondiscriminatory treatment of passengers and shippers of the subsidized carriers. There is an obvious correlation between a carrier's employment practices and the services it provides to individuals, especially in the area of public contact positions such as passenger attendants and salesworkers. As of December 1973, CAB had not initiated any procedures to assure nondiscriminatory employment practices by the subsidized carriers.[435/]

2. Compliance Monitoring Procedures

a. Complaint Handling

CAB relies primarily upon the investigation of individual complaints to assure nondiscrimination in air carrier services. Consumer complaints dealing with services, i.e., reservations problems and schedule irregularities, which constitute the bulk of CAB's complaint load, are handled by the Office of Consumer Affairs.[436/] Those complaints which involve violations of the Federal Aviation Act, such as those alleging discrimination, are the province of the Bureau of Enforcement.[437/] Data on all complaints under its

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435/ Gingery interview, supra note 420. CAB has recently noted its disagreement with this Commission concerning the need for efforts to prevent discrimination in air carrier services. CAB stated:

> Insofar as enforcement is concerned, we simply find unpersuasive the case made by the Commission's staff for the proposition that racial or other discrimination is being practiced which is escaping the Board's attention because of alleged defects in the enforcement mechanism, particularly in this day of increasingly effective public interest organizations dedicated to a wide variety of minority causes. Gillilland letter, supra note 354.

436/ The Office of Consumer Affairs assists travelers, shippers, and others in their dealings with air carriers. The Office was established by CAB in 1971 and it has assumed the responsibilities of the Consumer Complaint Section of the Bureau of Enforcement.

437/ The Bureau's enforcement responsibilities also cover subsidized air carriers; however no complaints have been filed against any of the subsidized carriers since Title VI became effective in 1964. In fiscal year 1973, one complaint concerning preboarding search preparatory to emplaning on a subsidized carrier was mistakenly directed to CAB. The complaint was referred to the Federal Aviation Administration which had jurisdiction in the matter. CAB made no attempt to determine the outcome of this complaint. Gingery interview, supra note 420.

jurisdiction are computerized by the Bureau.[438] This information identifies the nature of the complaint but does not include the race, ethnicity, or sex of the complainant.

In fiscal year 1973,[439] CAB received 15[440] informal complaints[441] which alleged discrimination against minority group members but none[442] which charged discrimination against women.[443] All but one

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438/ Data on complaints are entered initially on CAB Form 273 - Informal Case Opening Memorandum. The form records information on the file number, the opening date of the case, the type of violation, the geographic location of violation, and the provisions of the Federal Aviation Act which were violated. The names of the complainants and of the respondents are also included.

439/ In a related matter, the Lawyers' Committee for Civil Rights is representing the Congressional Black Caucus, the American Committee on Africa and several other groups that intervened in a CAB proceeding considering the application of South African Airways for a new route permit between South Africa and the United States. The intervenors objected to the granting of the proposed route on the ground that the airline, wholly owned by the South African Government, discriminates against blacks in employment and travel facilities. A hearing examiner denied the intervenors permission to submit testimony on discriminatory practices and recommended granting the airlines request. Subsequently, CAB granted the new route and the President signed the order. The Committee has taken an appeal to the U.S. Court of Appeals where the matter is now pending. Diggs v. CAB (D.C. Cir. No. 73-2194).

440/ This compares with approximately 900 to 1000 complaints on other subjects which the Bureau receives each year.

441/ Informal complaints are those usually received in letters or communications from individuals. Formal complaints can be filed either by a third party or outside parties or by the Bureau of Enforcement itself. The formal complaint procedures are governed by the Commission's Rules of Practice and the Administrative Procedure Act.

442/ The complaints included three charges of denied boarding based on race; four charges of disparate application of preboarding security procedures based on race; two charges of denial of inflight amenities because of race; one charge of removal from the aircraft at a point shorter than determined destination because of race; three charges of discourtesy to minority airline passengers; one charge of failure to provide travel agents with the adequate number of tickets because of ethnicity, and one charge of a racial slur by an airline employee to a person who had applied for but had been refused employment by the airline in question. CAB response, supra note 352.

443/ One was handled by personal interview because the complainant lived near the agency. The four complaints concerning preboarding search were referred to FAA because the alleged discrimination acts had been committed by its employees. Id.

of the discrimination complaints were handled by correspondence from the Washington office. None was the subject of a field investigation[444] and in none was a finding of discrimination returned.[445] CAB indicates that there are no agency guidelines for assessing the need for field investigation In general, such reviews are to be conducted when the complaint appears substantial, the facts are seriously disputed and not readily ascertained by correspondence, and possible formal action appears indicated.[446] CAB's standard procedure for handling complaints consists solely of referring the matter to the appropriate airline and then forwarding its explanation to the complainant. In the complaints reviewed by Commission staff, all CAB action was that of a noncommittal arbiter rather than a protector of the public interest.

It is unfair for CAB to place the responsibility for proving

444/ CAB indicates that a field investigation of a complaint will usually involve extensive interviewing of persons involved, examination of documents, travel, and telephone conversations. Interview with Richard O'Melia, Director, Bureau of Enforcement, CAB, June 21, 1973. In fiscal year 1973, Congress authorized the opening of four CAB field offices under the authority of the Bureau of Enforcement. As of December 1973, offices were beginning operations in Miami, New York, Anchorage, and Los Angeles. Each office is assigned one staff member and will handle, in addition to complaints of possible violations of the Federal Aviation Act, area complaints on consumer problems normally answered by the Office of Consumer Affairs. The field offices will also be responsible for any required investigations of complaints. Gingery interview, supra note 420.

445/ In the complaint involving the failure to provide inflight amenities, Western Air Lines did admit that there had been "a mixup of passenger service" but ascribed it to the confusion of the flight attendent. The involved employee was relieved of duty. CAB response, supra note 352.

446/ Id. The Director of the Bureau of Enforcement, Mr. William Gingery, stated that there are general, accepted procedures for initial handling of complaints such as acknowledging the complaint by letter and telephone conversations with the complainant to get additional facts. The investigator has the discretion to determine if further investigation, such as an onsite visit, is necessary. Gingery interview, supra note 420.

discrimination onto the complainant. It is clearly the responsibility of the agency to fully investigate each complaint and determine if violations of its rules and regulations have occurred.[447]

The only civil rights formal complaint ever processed by CAB resulted from the filing of an informal charge against Continental Airlines. The complaint alleged that the carrier had discriminatorily removed a black passenger from a flight in violation of the Federal Aviation Act.[448] The complaint was the subject of an intensive field investigation and culminated in the filing of a formal complaint against the carrier by the Bureau of Enforcement on January 10, 1972.[449]

The Bureau charged that the captain of the flight ordered the passenger off the aircraft with no review or investigation of the circumstances and with no opportunity for explanation or defense by the passenger.[450] CAB found that Continental had subjected the complainant to unjust dis-

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447/ As indicated on pp. 138-139 supra, ICC conducts field investigations of all civil rights complaints it receives.

448/ The complainant was a Federal civil rights official. Gingery interview, supra note 420.

449/ CAB, Complaint against Continental Airlines, Bernard F. Drederich, Enforcement Attorney, Jan. 10, 1972.

450/ Continental's personnel stated that they mistakenly felt that the passenger was traveling with another passenger who was involved in the disappearance of a hostess' billfold, although the facts subsequently revealed otherwise. The captain of the aircraft ordered the passenger removed solely on the advice of the flight hostesses without any independent investigation. Id.

crimination and ordered the carrier to cease and desist from such action.[451] CAB further ordered Continental to develop and enforce written procedures covering involuntary deplaning of passengers short of their destination.[452]

The relative value of complaint resolution as a means of monitoring air carriers' compliance with nondiscrimination prohibitions is severely limited if the availability of a complaint mechanism is not publicly known. Other than periodic press releases issued by the Office of Consumer Affairs on the number of complaints received,[453] CAB has taken no steps to inform the public, and particularly minorities and women, of its oversight responsibilities. Further, CAB has not required the carriers to post signs or notices indicating that discrimination in services and facilities is prohibited and outlining the procedure for filing complaints. It has not encouraged its regulatees to utilize materials concerning discrimination in languages other than English, e.g., Spanish, Chinese. Not only does CAB believe that discrimination is not a significant problem, but it has concluded that there is "no reason to believe that airline passengers are not aware that discrimination is forbidden."[454] CAB states that the steady increase

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451/ CAB, Docket No. 24107, Order to Cease and Desist, Continental Airlines, Respondent, June 6, 1972.

452/ Id.

453/ The press releases show the number of consumer complaints received by CAB by carrier and category of complaint. The releases are issued only in English and are not distributed to minority or female oriented press. CAB response, supra note 352.

454/ Id.

in the number of consumer complaints of all kinds indicates widespread public awareness of the availability of CAB's complaint procedures. 455/

In reaching this position, however, CAB has apparently not recognized the influence of several factors which traditionally have limited the effectiveness of complaint processing as a mechanism to assure non-discrimination. 456/ For example, many minority group members, especially those who do not speak English, do not know which agency has jurisdiction over specific companies. This is particularly true with respect to regulatory agencies which tend to operate in a business world with which few minority group members have any familiarity. Further, many minority group members have grown accustomed to discrimination, as being in the nature of things, and are reluctant to complain even in cases of overt discrimination. Complaint processing, especially the passive method utilized by CAB, as opposed to a program of affirmative activity tends to place the burden of establishing discrimination upon the individual complainant. This is a burden that individuals often find difficult to sustain.

455/ CAB response, supra note 352.

456/ As this Commission pointed out in 1968:

> There is substantial unanimity among FEP /fair employment practices/ commissions and professional sources, including a number of persons who have specialized for a lifetime in problems of administrative law, that complaint-oriented procedures to enforce nondiscrimination requirements, for various reasons, do not work. They cannot, in the light of two decades of experience, be expected to work.

Letter from Howard A. Glickstein, Acting Staff Director, U.S. Commission on Civil Rights to Rosel H. Hyde, FCC Chairman, Sept. 9, 1968.

b. Reports of Staff Travel

CAB Form 146 is utilizied by CAB staff for reporting on any discriminatory acts observed during official travel both on subsidized and all other air carriers. The guidelines advise staff members to be alert, both on board and at terminals, for any indication of discriminatory service or treatment based on race, color, or national origin.[457] The completed reports are submitted to the Chief of CAB's Investigation Unit for a review and inquiry into any findings of discrimination. In fiscal year 1973, only 128 reports on certificated carriers were submitted.[458] In none of the reports was any instance of discriminatory treatment observed by CAB staff members.[459]

457/ The guidelines specify that staff members be especially alert to:

(1) Any difference in quality, quantity, or the manner in which service is provided;
(2) Segregation or separate treatment;
(3) Restriction in the enjoyment of advantages, privileges, or other benefits provided to others;
(4) Different standards or requirements for participation in the airline's service; and
(5) Methods of administration or management practices which would defeat or substantially impair the program for elimination of discrimination.

458/ Gingery interview, supra note 420.

459/ Id.

C. Federal Power Commission

1. Civil Rights Responsibilities

Under the Federal Power Act, [460] each hydroelectric project, in addition to the generation of electricity, must be adapted to other beneficial public uses. [461] Of these activities, the provision of public recreational use of the project waters carries significant civil rights implications. In 1965, FPC issued regulations [462] requiring licensees to inform the public of the recreational opportunities at projects, as well as of rules governing the accessibility and use of those facilities. [463] In addition, signs identifying and describing the project were required to be posted at all points of public access. These

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460/ The Federal Power Act specifically requires:

> ...that the project adopted...shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefits of interstate or foreign commerce, for the improvement and utilization of water power development and for other beneficial public uses, including recreational purposes;... 16 U.S.C. § 803(a).

461/ The projects may provide for navigation, irrigation, flood control, industrial uses, municipal water supply, recreation, and the protection of fish and wildlife.

462/ 18 C.F.R. §§ 8.1-8.2 entitled "Part 8 - Recreational Opportunities and Development at Licensed Projects."

463/ Following the issuance of a license, the rules call for the publication once a week for 4 weeks in a local newspaper of all relevant information concerning the use of the facilities. The rule states that the publicity efforts "shall include but not be limited to...." the publication notice (emphasis added). 18 C.F.R. § 8.2.

regulations, however, apply to those facilities which received license or license amendments since enactment of the regulations.[464]

On April 27, 1967, FPC issued an amendment to its regulations concerning recreational facilities which requires that they be open to all members of the public without regard to race, color, religion, or national origin.[465] The amendment further requires that notices that the facilities are open to members of the public without discrimination be posted at the same locations as the project identification signs. FPC has not acted to include discrimination based on sex in its regulations although this prohibition is mentioned in the agency's general policy relating to the use of recreational facilities.[466]

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[464] Interview with Edward Savwoir, Administrative Officer, Bureau of Power, FPC, Dec. 11, 1973. As of December 1973, FPC did not know how many recreation areas were covered by these regulations.

[465] 18 C.F.R. § 8.3.

[466] FPC in a statement of general policy concerning recreational facilities at licensed hydroelectric projects emphasized that responsibility for the development of recreational facilities for the public use rests with the owners of those licensed hydroelectric projects whose land and water resources have this potential for multiple use. Among the responsibilities which the statement specified should be assumed by licenses were to: "ensure public access and recreational use of project lands and waters without regard to race, color, sex, religious creed or national origin," and to "inform the public of recreational opportunities at licensed projects, as well as of rules governing the accessibility and use of those facilities" (emphasis added). FPC, Recreation Opportunities at Hydroelectric Projects Licensed by the Federal Power Commission 10 (October 1970).

In October 1970, there were 555 project recreational facilities located in 37 States.[467] FPC had indicated to this Commission in 1971 and 1972 that its nondiscrimination regulations covered all licensed hydroelectric projects.[468] In 1973, however, FPC officials stated that there was some question as to whether all facilities were actually under the jurisdiction of the regulations.[469] FPC indicated that, because of certain proscriptions on its licensing authority, the possibility existed that only those facilities which were either granted licenses or license amendments since the issuance of the regulations in 1967 were covered.[470] In September 1974, FPC reported that of 475 hydroelectric project licenses, 155 are subject to all the regulations.[471] FPC indicated that 51 projects are currently subject only to the initial posting requirements. An overall review of the status of applicability of the regulations is still in progress.[472]

467/ Id.

468/ FPC Response to U.S. Commission on Civil Rights Questionnaire, April 15, 1971 and FPC Response to U.S. Commission on Civil Rights Questionnaire, July 31, 1972.

469/ Savwoir interview, supra note 464.

470/ Telephone interview with Fred Hagenlock, Staff Attorney, Office of General Counsel, FPC, Jan. 11, 1973.

471/ In a letter to this Commission, FPC indicated that certain legal considerations arise from the status of the license instrument in instances where the applicant may not be seeking an initial license or an amendment of an existing license or a new license. Whatever those legal constraints, however, FPC states that they do not negate the existence of the agency's policy and announced intention to eliminate discrimination in all areas where it may do so under its statutory authority. Kidd letter, supra note 382.

472/ Id.

Although a serious weakness exists in FPC's power to ensure nondiscriminatory access to facilities, the agency has taken no steps to correct the deficiency.[473]

2. Compliance Mechanisms

a. Compliance Surveys

FPC is the only regulatory agency to implement an affirmative program to assure nondiscrimination in the use of facilities furnished by its licensees. All licensed projects are inspected annually by FPC regional staff[474] to determine compliance with license terms and FPC regulations.

FPC initially issued instructions to its field staff in 1970 on investigating compliance with the nondiscrimination prohibition.[475] Regional engineers are required to review compliance with all the regulations governing recreational

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473/ FPC has attempted to get licensees to voluntarily put up the identification signs. FPC indicates that it is possible that enforcement of nondiscrimination at facilities could be achieved under other FPC statutes. Hagenlock interview, supra note 470.

474/ FPC's Bureau of Power is responsible for the annual surveys. They are conducted by regional office staff located in New York, N.Y.; Atlanta, Ga.; Chicago, Ill.; Fort Worth, Tex.; and San Francisco, Cal.

475/ Memorandum from George E. Tomlinson, Acting Chief, Bureau of Power, to All Regional Engineers, Sept. 2, 1968. New instructions were issued to FPC's regional staff in 1971 and 1973: Memorandum from T. A. Phillips, Chief, Bureau of Power, to All Regional Engineers, Nov. 19, 1971; and Memorandum from T. A. Phillips, Chief, Bureau of Power, to All Regional Engineers, Apr. 19, 1973. These new instructions did not substantially change the 1968 instructions.

facilities[476] and to observe the use of project recreational facilities. The inspection reports are to note the percentage of minority group usage.[477] If there is little or no use by members of minority groups, the regional staff is charged with determining the reason.[478] In February 1974, the instructions were amended to provide that at least 10 percent of all inspections must take place on weekends and holidays when usage of recreational facilities is at its highest.[479] The reviews, however, do not include interviews with local minority group leaders to ascertain their opinions on the use of the facilities and possible causes for any underrepresentation.[480]

476/ For facilities required to post signs and otherwise publicize their public nature, photographs of the identification signs are to be included in the report. The licensee is also required to provide the text of the publicity notice and the dates of its publication. Tomlinson memorandum, supra note 475.

477/ All of the inspection reports reviewed by Commission staff noted observations of minority utilization although none broke down figures into categories of minorities. The observations were usually worded in this manner: "Seven fisherman were seen along the power canal and at the powerhouse's tailrace. Two were of a minority group."

478/ If the inspector believes that any minority underutilization is caused by any licensee practices that can be corrected or improved, remedial action is to be recommended and compliance with such recommendation reported by licensee in writing. Tomlinson memorandum, supra note 475.

479/ Through September 15, 1974, 142 recreation inspections had been conducted in calendar year 1974. Thirty-four of these inspections took place on weekends and holidays. Kidd letter, supra note 382. This Commission has previously recommended to FPC that new review instructions be issued to include these suggestions. Reassessment report, supra note 247 at 415.

480/ Improved instructions were issued for a special series of reviews in 1972 and 1973. See Section IIC2b infra for a discussion of these reviews.

In addition, FPC's review instructions do not require that minority utilization rates be compared to local population data. Without such comparisons, no accurate judgment is possible on whether minority group utilization is at expected levels.[481] In inspection reports reviewed by Commission staff, no FPC action was initiated even where no minority utilization was observed. FPC staff indicated that the agency had never initiated any special reviews in response to low minority use figures for a project facility.[482] Although it is commendable that FPC conducts reviews of recreation facilities, the mere surveying of minority utilization is a passive exercise and fulfills no purpose if the data gathered are not utilized as an effective tool to assure

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481/ For example, in the review of the Petenwell-Castle Rock project in Wisconsin, three minority group members were noted out of 34 recreationists, or 9 percent. However, since the report did not provide local population figures, FPC cannot reach any conclusion as to whether this minority utilization rate is adequate. Further, in the review of the North Umgua River project, in Oregon, no minority group members were identified among 46 recreationists. FPC took no action to determine the reasons for the lack of minority utilization at this facility.

482/ Savwoir interview, supra note 464.

nondiscrimination.[483]

b. Special Reviews of Minority Utilization

During the 1972 recreation season, the Bureau of Power initiated a special survey to determine the extent of minority group utilization at certain recreational project facilities. The survey focused on four projects which were selected on the basis of

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483/ FPC staff have recommended interviews of minority recreationists during reviews. The staff have noted that "merely counting the number of minorities is not really meaningful." Memorandum from Edward Savwoir, Administrative Officer, Bureau of Power, FPC, to Executive Director, FPC, Nov. 5, 1973. In a letter to this Commission, FPC stated that the agency:

> had been engaged in activities to encourage minority group use of recreation facilities at licensed projects. These activities have included advising representatives of minority communities near recreation facilities. The Commission has provided minority group representatives with its pamphlet entitled "Recreation Opportunities at Hydroelectric Projects Licensed by the Federal Power Commission." Some 7,000 copies of this publication have been distributed in the last 4 years. Accordingly, FPC rejects the allegation that our activities can be classified as "passive." Kidd letter, supra note 382.

total usage and usage by minority groups.[484] The instructions issued by FPC for this special series of reviews contained significant improvements over the regular guidelines. The designated FPC regional offices were instructed to make a minimum of seven visits to each of the projects with three scheduled for weekend days or holidays.[485] FPC personnel were instructed to visit these facilities to determine usage, as well as to check on licensees' overall compliance with FPC's regulations for nondiscrimination governing recreational facilities. Visual observation techniques were utilized to identify minority users but only one review categorized minority group usage by minority group. The instructions did not call for interviews with minority group organizations. Further, regional staff were not required to compare minority usage data with local population figures to determine if there was any underutilization.

484/ The four projects selected for the survey were:

FPC Project No.	Name
405	Conowingo Dam - Md.
2232	Wylie Development - N.C.
2146	Logan Martin Development - Ala.
2186	Markham Ferry - Okla.

485/ Memorandum from T.A. Phillips, Chief, Bureau of Power, FPC, to All FPC Regional Engineers, Nov. 19, 1971.

The reviews at the Wylie Development, located near Charlotte, North Carolina, and at the Logan Martin Development, near Montgomery, Alabama, found respective minority utilizations rates of 7.5 and 12 percent.[486] The area surrounding the Wylie Development facility has a 23 percent minority population[487] and the Logan Martin Development is in an area that has over 35 percent minority representation. Yet, no additional investigation or corrective measures were instituted by FPC.[488]

The surveys at Conowingo Dam, located northeast of Baltimore, Maryland, were limited because of storm damage to the facility. Only two visits were made when there was any significant recreational activity. Minority utilization rates of 10 and 9 percent, respectively, were noted during those visits.[489] Once more, FPC did not undertake any further investigation although the minority usage was significantly below the 24.2 percent minority population of the area.[490] The FPC survey of the Markham Ferry project,

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486/ Memorandum from D.C. Fishburne, Regional Engineer, Atlanta Regional Office, FPC, to Chief, Bureau of Power, FPC, Nov. 7, 1972.

487/ The Logan Martin project is located near the Montgomery, Alabama, Standard Metropolitan Statistical Area (SMSA). Census of the Population: 1970, General Population Characteristics, Final Report PC(1)-B1, United States Summary, Table 66, p. 315.

488/ The closest SMSA to the Wylie Development is the Charlotte, North Carolina, SMSA. Id.

489/ Memorandum from John A. Spellman, Regional Engineer, New York Regional Office, FPC, to Chief, Bureau of Power, FPC, Nov. 13, 1972.

490/ Conowingo Dam is located in the Baltimore, Maryland, SMSA.

located near Tulsa, Oklahoma, was the most detailed and was the only report which contained an analysis of population figures as compared to minority group utilization of the recreation facilities.[491] The field staff attempted to visit each site at approximately the same time during each visit, and reported that minority group members comprised 12 percent of the total recreationists observed.[492] The field examiner also canvassed the published information locally for material on the trends of recreation use by minority groups.

In the 1973 recreation season, the program of special inspections of minority usage was continued and expanded. Five projects were selected for the surveys in Maryland, New York, Michigan, Georgia, and California.[493] Instructions for the surveys again called

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491/ The Markham Ferry report compared utilization rates for Indians and blacks with their population in the State. In Craig and Mayes Counties, surrounding the project, Indians constitute 8.9 percent of the population and blacks, 1.9 percent. The report also attempted to explain the disrepancies between the data. Memorandum from Donald L. Martin (by George E. Townsend), Regional Engineer, Fort Worth, Regional Office, FPC, to Chief, Bureau of Power, FPC, Sept. 14, 1973.

492 The report was also alone in categorizing activity by type of minority--Indian and black.

493/ The involved projects are:

Project No:	Name
405	Conowingo - Md.
785	Calkins Bridge - Mich.
1951	Sinclair - Ga.
2153	Santa Felicia - Cal.
2355	Muddy Run - N.Y.

for seven visits to be made to each of the projects, but further required "at least three and preferably five" to be on a Saturday, Sunday, or holiday.[494] Further, observations were to take place at public use areas during expected peak user periods to obtain a representative sample of recreationists. Field examiners were required to concentrate the observations at public use sites so that the persons observed were visitors rather than semipermanent owners or renters of cottages.

Each field examiner submitted an individual report following each visit and a summary report after the last visit. FPC prepared a reporting form for field use which listed all categories of activities, and had items for descriptions of the weather, time, day, and site of the review.[495] Using visual observation, field examiners were required to tally the number of recreation users engaged in each activity and the number of that total which were minority group members.

As of December 1973, FPC had not released the reports on each project; however, minority utilization rates for each project had been computed.[496] The Sinclair Project, near Milledgeville, Georgia, had a 5 percent minority utilization rate. The Muddy Run and

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494/ Other visits were to be staggered on different days of the week to the extent practicable. Memorandum from T.A. Phillips, Chief, Bureau of Power, FPC, to All FPC Regional Engineers, May 3, 1973.

495/ Id. The form is entitled "Recreation Facility Use Survey."

496/ Savwoir interview, supra note 464.

Conowingo projects reported a 4 and 16 percent utilization rate, respectively. At Calkins Bridge, near Kalamazoo, and Santa Felicia, near Piru, California,[497] 26 percent of recreationists observed were minority group members. FPC has not indicated any intention to determine if these minority usage rates demonstrate any underutilization.[498] Nor has it indicated what it will do if it finds underutilization, as, for example, appears to exist at the Sinclair Project, which is in an area which has a 29.2 percent minority population and[499] only a 5 percent minority usage rate.

497/ Piru, California, is located approximately 45 miles southeast of downtown Los Angeles.

498/ The Macon, Georgia, SMSA surrounds the Sinclair Project. Bureau of the Census, supra note 487 at 321.

499/ In a letter to this Commission, FPC stated that the 1974 inspection reports do mention minority population comparisons in the areas visited. The agency asserts that it is not difficult, therefore, for a reviewer of these reports to detect any minority underutilization of the recreational facilities. Kidd letter, supra note 382. Commission staff review of FPC reports indicate, however, that in only two of four reports on the special series of reviews on minority utilization was any mention made of minority populations near recreational facilities and no comparisons were made with minority utilization rates of the facilities themselves. Further, the regular annual inspection reports of facilities analyzed by Commission staff yielded few instances of comparative statistics reported by field staff. In addition, the mere presentation of statistical information provides no purpose if not used as an indication of noncompliance.

In addition to the observation of minority group use by regional staff, FPC directed a Washington-based representative of the Bureau of Power to participate in selected visits to special survey projects for the purpose of personally interviewing minority group visitors. At each of these projects, minority group visitors were interviewed concerning their perceptions of the availability of the recreational facilities. In addition, leaders of minority group organizations and minority group communities were contacted to ascertain their feelings about use of the facility, i.e., whether there were any subtle discriminatory barriers and what can be done to overcome any minority underutilization of recreational facility. However, the interviews primarily focused on black groups even in areas

where there were significant numbers of other minority groups.[500] In interviews in Lancaster, Pennsylvania, for example, concerning the facilities at Conowingo and Muddy Run, no contact was made with any Puerto Rican groups although they constituted an equal percentage of the population as compared to blacks.[501] Further, in Milledgeville, Georgia, which has a sizeable Cuban representation, no contact was made with any Cuban community leaders or individuals.[502]

Upon completion of the minority interviews, it was concluded that no subtle discrimination existed at any of the surveyed projects. A recommendation was made, however, that FPC field staff interview minority recreationists as part of the regularly scheduled compliance surveys. Further, it was concluded that in many cases minorities were not aware of recreation opportunities

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500/ In each area, the FPC official, Mr. Savwoir, met with representatives of the National Association for the Advancement of Colored People, the Urban League, and various local black organizations.

501/ Memorandum from Edward O. Savwoir, Administrative Officer, Bureau of Power, FPC, to Chief, Bureau of Power, FPC, Aug. 2, 1973.

502/ The FPC official indicated that the "Cuban population has infiltrated into the white community and therefore associate themselves with the white population." Memorandum from Edward O. Savwoir, Administrative Officer, Bureau of Power, FPC, to Chief, Bureau of Power, FPC, Sept. 27, 1973. In a letter to this Commission, FPC stated that it is the agency's expressed policy to contact representatives of all minority groups. Kidd letter, supra note 382.

and it was recommended that minorities be included in the information channels pertaining to the construction and expansion or recreational facilities. FPC was further asked to extend immediately the regulations covering recreational facilities[503/] to cover all licensed projects.

503/ Id. The memorandum also recommended the continuation of the minority interviews in 1974 in the special surveys of minority utilization.

c. Complaint Handling

FPC did not receive any complaints alleging discrimination at project recreation facilities in fiscal years 1972 and 1973.[504] For this reason, FPC states that it sees no need to maintain a mechanism to handle complaints.[505] Although the lack of complaints may indicate that the public is unaware of FPC's jurisdiction over hydroelectric projects, the agency has not taken any steps to publicize the nondiscrimination pro-

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504/ Still pending before FPC, however, is a complaint filed in April 1971 by the Pitt River Indians of California. On October 28, 1970, Pacific Gas and Electric Company (PG&E) filed with FPC an application for a new license in Project 233, located 31 miles northwest of Dunsmuir, California. On April 6, 1971, the Pitt River Indians filed a petition to intervene in the proceeding. They alleged that PG&E maintained Project No. 233 and the recreational facilities

> on a basis which discriminated against members of the public, and in particular, Indians on the arbitrary basis of race, color, religious creed or national origin and failed to make recreational opportunities on project waters and land available to all members of the public without discrimination in violation of Sections 8.3 and 8.26 of Part 8 of Title 18 U.S.C.; in violation of the existing license of Project 233 and in violation of the Federal Civil Rights Act.

On June 11, 1971, FPC granted the petition. However, prior to taking action on PG&E's application and the Pitt River Indians allegations, FPC must allow for the public notice of the application and circulation to Federal, State, and local agencies for comment. Thereafter, FPC staff will prepare an environmental impact statement. Only after these steps will FPC issue a decision on the issue. FPC Response to U.S. Commission on Civil Rights Questionnaire, Aug. 7, 1973 [hereinafter cited to as FPC response]. In January 1974, FPC indicated that because of staff limitations it was giving priority to handling projects which are proposing new generation capacity. The Chief of the Bureau of Licensing stated that the PG&E application did not fall into the top priority class and it would probably be at least a couple of years before further action was taken on it. Telephone interview with Jim Stout, Chief, Bureau of Licensing, FPC, Jan. 21, 1974.

505/ FPC response, supra note 507.

hibitions and its interest in receiving complaints.[506] The only publicity effort took place in 1968 when the Federal Power Act was revised to include, among other items, a simplified procedure for making complaints.

FPC states that if and when a recreational facility is identified as one not being used by minorities because of suspected discriminatory barriers, the opportunity to file complaints will be given special publicity with emphasis in the minority community.[507] FPC has never, however, initiated any such action even though low minority utilization rates exist at some recreational facilities reviewed by FPC staff. Further, since the agency makes no comparison between minority use statistics and census data, it is unlikely that it will ever determine that there is underutilization at a particular facility.

506/ FPC issues a publication entitled "Recreational Opportunities at Hydroelectric Projects Licensed by the Federal Power Commission," which mentions the prohibitions against discrimination.

507/ FPC response, supra note 504.

III. Minority and Female Entrepreneurship

Of the industries regulated by ICC, CAB, and FPC, the motor transportation industry alone offers substantial opportunities for entrepreneurship by minority group members and females.[508] Entry into this field requires relatively low capital investment[509] and minimal qualification criteria. Consequently, many minority group members and females are now in a position to seek operating authority from ICC. These opportunities, however, have been severely restricted by ICC's interpretation of its licensing authority. The effects of ICC's regulation of the industry are clear: of over 15,000 certified motor transportation companies, a miniscule number are owned totally or in part by minority group members or females.[510]

508/ Because of the nature of the industries they regulate, CAB and FPC do not appear to have much opportunity to facilitate minority and female ownership of their regulated industries, such as gas and water power companies and airlines. These require an initial capital investment of many millions of dollars and there are few new or competing applicants in search of licenses or certificates of authority.

509/ Funds for initial capital investments are available to individuals or groups either through savings, loans, or Federal minority entrepreneurship programs.

510/ ICC does not collect racial, ethnic, or sex data on the ownership of carriers under its jurisdiction; therefore, the agency has no estimate on how many are owned by minority group members or females. However, ICC staff indicated that there were few such firms. Interview with Robert D. Pfahler, Chief, Bureau of Operations, ICC, June 12, 1973. In 1971, the Independent Truckers League, a trade association for minority truckers indicated that only one black male had received authority to operate across the country as a common carrier. Statement of the Office of Minority Business Enterprise, U.S. Department of Commerce, Before ICC in Ex Parte 278, Equal Opportunity in Surface Transportation, Nov. 22, 1971.

ICC requires applicants for operating authority to show a "public convenience and necessity" for their service before an authorization is granted.[511] This criteria is interpreted by ICC as primarily requiring a determination of whether existing services are adequate to meet the transportation needs of the public.[512] Even if an applicant offers a service which is lower priced or more efficient, ICC will bar any new competition as long as existing carriers show solvency and have the necessary equipment.[513]

ICC states that the purpose of its policy is to preclude the presence of so many carriers that competition becomes destructive.[514] Applicants, therefore, in order to be authorized to operate, must establish that the service they offer will not constitute competition to existing certified carriers or that there are insufficient carriers operating in an area. These requirements place a heavy burden of proof on the new applicant who does not have access to an existing carrier's data in order to demonstrate valid differences and savings to the public. Furthermore, new applicants, particularly minority group members and females, normally are unable to invest further capital to undertake detailed studies of the economics

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511/ 49 U.S.C. § 307(a).

512/ ICC response, supra note 389.

513/ ICC stated in a letter to this Commission that "...the issues of solvency and competitive effect are only rarely the sole considerations in our proceedings, and then only when it is found that the public is already receiving a reasonably adequate transportation service. The principal criterion in determining whether any motor carrier authority should be granted is the public need for the proposed service." Stafford letter, supra note 308.

514/ ICC response, supra note 389.

of motor carriers to show differences.[515] Generally the consequence of ICC interpretation is the protection of existing carriers rather than the interests of the public. ICC indicates that it has granted authorization to minority applicants desiring to provide a specialized service for the minority group community.[516] However, minority and female applicants should be free to compete to serve all members of the public rather than being limited to providing services to their own groups.

ICC is studying the issue of revising its licensing standards to ease entry for minority group members and females as part of its rulemaking on equal employment opportunity.[517] However, as the focus of the inquiry did not specifically identify minority entrepreneurship as one of the subjects to be covered, ICC received few comments on this issue.

In November 1973, a Federal circuit court of appeals overruled a decision of the Federal Communications Commission (FCC) that, in a multiracial viewing area, a competing applicant's substantial black ownership should not be an independent comparative factor in the agency's decision to award a license.[518]

515/ ICC indicates that an applicant must demonstrate:

> ...the individual needs of the supporting shipper or shippers, the volume of traffic expected to be shipped, and the availability and quality of services from existing carriers. In short, an applicant has a greater burden to present convincing and substantial evidence that is within its own and the supporting shipper's knowledge, than to present any costly evaluation of the financial condition of the position of existing carriers. Stafford letter, supra note 308.

516/ On March 8, 1973, ICC granted a certificate of authority to Transportes Hispanos, Inc., a company which proposed to provide transportation for passengers between Chicago, Illinois, and Laredo, Texas. The service is aimed particularly at meeting the needs of the Spanish speaking community in Chicago. The company will provide drivers of Spanish speaking background and will pick up passengers at their homes.

517/ See Section IB2, supra for a discussion of ICC's general rulemaking on equal employment.

518/ TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973).

The court held in TV 9, Inc. v. FCC that the public interest criterion embodied in the Communications Act required FCC to consider the race of shareholders in competing application proceedings.[519]

> To say that the Communications Act, like the Constitution, is color blind, does not fully describe the breadth of the public interest criterion embodied in the Act. Color blindness in the protection of the rights of individuals under the laws does not foreclose consideration of stock ownership by members of a Black minority where the Commission is comparing the qualifications of applicants for broadcasting rights in the Orlando community. The thrust of the public interest opens to the Commission a wise discretion to consider factors which do not find expression in constitutional law. Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to Black participation among principals of applicants for television rights. However elusive the public interest may be it has reality. It is a broad concept, to be given realistic content. [520]

Since ICC is similarly mandated to regulate surface transportation in the public interest, the court's decision would appear to also apply to its licensing procedures and policies. Unless ICC acts to amend its licensing rules, the present standards will continue to operate to the detriment of minority and female applicants.[521]

519/ Id. As of June 1, 1974, the case was on appeal to the Supreme Court.

520/ Id. at 936.

521/ See Enforcement Effort report, supra note 247, at 277-80; see also, One Year Later report, supra note 247, at 185; and Reassessment report, supra note 247, at 421-22.

IV. Legal Services

The public is generally unaware of regulatory law and of the way in which the regulatory system functions. Therefore, it is necessary that information be provided to citizens which explains the Federal regulatory procedure, the legal obligations of licensees, and the rights of the public with respect to these licenses. It is unfortunate, but true, that the technicalities of the regulatory practices make it extremely difficult for the public, and particularly minorities and women, to act positively to protect their rights unless legal counsel and services are available.

That the public has the right and even the responsibility for participation in the regulatory process is clear. The regulatory agencies, in view of their mandate to regulate in the public interest, must provide avenues to encourage informed public participation in their proceedings.[522/] Without free legal counsel and services, those individuals who wish to challenge regulatory actions but are financially unable to do so will be prevented from participating in the regulatory system.

522/ Free legal services which can be provided encompass not only ancillary support, i.e., cost of duplication of materials and service of papers, but also legal advice on available courses of action and, if necessary, representation of the individual or group throughout any administrative proceedings.

A. Interstate Commerce Commission

ICC has not offered free legal counsel to individuals wishing to challenge agency actions but unable to afford the expense of doing so.[523] It has been studying the question of providing free legal services for over 37 months as part of Ex Parte 278, its general rulemaking on equal employment.[524] As of June 1, 1974, no decision had been reached on this issue and ICC has not even indicated when a resolution is expected. Further, there is some question as to the scope and depth of the investigation with reference to free legal services. It was the opinion of ICC's staff which is handling the rulemaking that the original petition which prompted the rulemaking called for an investigation into the possibility of providing free legal services.[525] The petition, however, only requests ICC action in the area of employment discrimination.[526] The Notice of Proposed Rulemaking and Order defines the inquiry as being for the purpose of examining the area of equal employment and any "other program in this area."[527]

523/ Telephone interview with Fritz Kahn, General Counsel, ICC, June 5, 1974. ICC, however, has instituted an Office of Public Counsel to elicit public opinion through hearings across the country on the proposed reorganization of the railway system. Authority for creation of this unit was a broad provision in the National Railway Act which permits ICC to employ those attorneys it finds necessary. The establishment of this Office would seem to set a precedent for agency provision of legal services and counsel to members of the public who are financially unable to participate in regulatory actions.

524/ For a discussion of the equal employment rulemaking at ICC, see Section IB2 supra.

525/ Interview with Henry Snavely, Chief, Section of Operating Rights, ICC, June 19, 1973.

526/ Citizen's Petition Requesting Rulemaking to Require Interstate Common and Contract Carriers by Motor Vehicles to Show Nondiscrimination in their Employment Practices, Mar. 11, 1971.

527/ ICC, Ex Parte 278, Equal Opportunity in Surface Transportation, May 6, 1971.

Consequently, since the inquiry was so loosely defined, most interested parties did not understand that it included a discussion of free legal services and did not comment on this aspect of the rulemaking.[528] If ICC eventually issues a decision on this matter, the possibility that it will do so without the benefit of public comment is regrettable.

B. Civil Aeronautics Board

CAB does not provide free legal counsel and basically does not provide free legal services to individuals seeking to participate in regulatory proceedings.[529] The position of CAB is that "the interests of the individual members of the public are represented most effectively by groups and organizations, and by other governmental agencies."[530] CAB indicates

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528/ Staff of this Commission reviewed many comments which had been submitted to ICC on the rulemaking and found none which addressed the question of free legal services.

529/ CAB notes that its rules permit "any person" to appear at hearings, to present evidence relevant to the issues, to cross-examine (with the consent of the examiner, which is normally given), and to present a written statement of position (14 C.F.R. § 302.15(a)). Further, no fee is charged for participation or for filing of documents. CAB Response to U.S. Commission on Civil Rights Questionnaire, Apr. 19, 1971. CAB is also following the guidelines of the Office of Management and Budget for implementing the provisions of the Federal Advisory Committee Act which state that transcripts of agency proceedings shall be made available to any person at the actual cost of duplication. CAB response, supra note 352.

530/ CAB Response to U.S. Commission on Civil Rights Questionnaire, Apr. 19, 1971.

that this determination is based upon the nature and complexity of the agency's major regulatory proceedings.[531]

CAB further states that although it recognizes the possibility that there may be individuals or groups which have insufficient funds to obtain legal counsel, it would not be financially feasible for the agency to provide a regular program of legal assistance.[532] CAB also expresses the opinion that it should not undertake any such program until a national policy has been established and congressional approval and appropriations obtained.[533] CAB has not, however, taken any affirmative steps to stimulate national policy formulation on this subject or proposed any legislation in this regard.[534] Although CAB maintains that it does not "intend to discourage individual participation,"[535] this is a probable result[536] of

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531/ CAB response, supra note 352. It is clear that CAB recognizes that the nature of the major regulatory proceedings requires an expertise not held by most members of the public:

> Because of the complexities of such cases, involving as they do, transportation economics, they simply do not lend themselves to effective participation by individual members of the general public. The fact is that the average individual simply lacks the expertise to assist materially in the development of a meaningful record. CAB Response to U.S. Commission on Civil Rights Questionnaire, Aug. 7, 1972.

532/ CAB Response to U.S. Commission on Civil Rights Questionnaire, Apr. 19, 1971.

533/ Id.

534/ CAB response, supra note 352.

535/ CAB Response to U.S. Commission on Civil Rights Questionnaire, Aug. 7, 1972.

536/ CAB reports that "not many" individual members of the public take advantage of Rule 14 (14 C.F.R. § 302.14) allowing participation at Board hearings, "doubtless because they do lack the requisite expertise (or interest)". Id.

the agency's present policy.[537]

C. Federal Power Commission

FPC has adopted a procedure for providing some legal services whereunder any interested party or intervenor without the financial means to participate fully in an FPC proceeding is furnished transcripts free of charge and is afforded free duplication and service of its filings.[538] FPC "strongly opposes"[539] a program of free legal services, however, contending that it would afford particular groups what amounts to a public subsidy to prosecute their particular views. The agency also believes that such a policy would "strongly encourage frivolous and champertous litigation and tend to reduce the hearing process to a shambles."[540] FPC's concern appears unfounded, since it could establish a mechanism to review applications for legal counsel and grant those involving compelling public interest issues.[541]

537/ For a discussion of the difficulties of participating in CAB proceedings, see S. Lazarus, supra note 249 at 226-29.

538/ FPC also makes available information on its rules and regulations and other information which would be useful to litigants through its Office of Public Information. In compliance with the Federal Advisory Committee Act, the cost to the public of transcripts of hearings held before FPC has been reduced to the cost of duplication. FPC response, supra note 504.

539/ Id.

540/ Id.

541/ A February 1, 1973, action by FPC to raise the wholesale rates that producers can charge for natural gas illustrates the need for public participation in regulatory proceedings in order to protect the public interest. FPC, in a closely divided vote, approved the highest rates in its history at the request of gas producers. FPC Chairman Nassikas, labeling the action as a "travesty of regulatory justice," indicated that an appeal to the courts was impossible because no one had intervened in the proceeding. Washington Post, Feb. 3, 1974, A, Col 2. 1,3. The provision of free legal counsel by FPC may well have stimulated public participation in this proceeding.

FPC has been resolute in its insistence that it does not have authority to provide free legal counsel. It contends that this position has been upheld by the Second Circuit Court of Appeals in Greene County Planning Board v. Federal Power Commission.[542] In this case, the intervenors requested FPC, under authority of the Federal Power Act,[543] to pay their expenses, including counsel fees, in the proceedings. In its order issued October 29, 1971, FPC stated that it did not have the authority "to transfer our operating funds to others in order to finance their activities in proceedings before this Commission."[544]

The court upheld the FPC order; however, the decision appeared to relate to reimbursement of persons not employed by FPC and does not entirely preclude the possibility of using FPC employees to provide advice and counsel to petitioners. It appears that the court foresaw the possibility of FPC's defraying, or, in some fashion, incurring some of the petitioners' costs on its own activities:

542/ 455 F. 2d 412 (2nd Cir. 1972). The case involved two municipal intervenors, the Greene County Planning Board and the Town of Durham and Association for the Preservation of Durham Valley, who objected to a construction authorization for transmission lines requested by the Power Authority of the State of New York.

543/ The intervenors pointed to the broad authority given to FPC in Section 309 of the Federal Power Act, as amended, "to perform any and all acts...necessary or appropriate to carry out the provisions of this Act," and in Section 314 (c) to "employ such attorneys as it finds necessary...for proper representation of the public interests...." Greene County Planning Board v. Federal Power Commission 455 F.2d 412, 426 (2nd Cir. 1972).

544/ FPC, Order Denying Motions and Appeals, Project No. 2685, Oct. 29, 1971.

> Without a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules. (Emphasis added) 545/

As this Commission expressed to FPC, the agency's refusal to act in this area does not appear to be justified by a claim of lack of authority, but rather appears to be predicated on the agency's own opposition to such a program. 546/

545/ Greene County Planning Bd., supra note 542, at 427.

546/ Letter from Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, to John N. Nassikas, Chairman, Federal Power Commission, June 6, 1973.

V. Civil Rights Staffing

Neither ICC, CAB, nor FPC has provided adequate staff to monitor industry compliance with the limited civil rights responsibilities they have acknowledged.[547] There are no staff members who spend as much as 25 percent of their time on civil rights and the agencies have not provided special training for the staff responsible for enforcing equal opportunity.[548] Full-time staff assigned solely to civil rights responsibilities would be able to monitor the implementation of compliance efforts by program staff, process and investigate complaints, and coordinate and plan civil rights activities.

ICC's Bureau of Operations monitors compliance by licensees with all requirements of the law relating to their provision of services and facilities, including the requirements which prohibit discrimination. There are no staff members assigned solely or chiefly to ascertaining if licensees are complying with the nondiscrimination requirements.[549] If the pending rulemaking on equal employment rules for regulatees is affirmatively resolved, ICC has indicated it will review its funding and staff allocations.[550]

547/ This section concerns only the external civil rights responsibilities of the regulated industries and not the internal equal employment program of each agency. ICC, CAB, and FPC each have such a program which is monitored by the U.S. Civil Service Commission. For an evaluation of the activities of that agency, U.S. Commission on Civil Rights, The Federal Civil Rights Effort- 1975-Employment ch. 1 (in print).

548/ The lack of such training programs is particularly significant because the identification of covert forms of discrimination often requires a sensitivity and awareness of equal opportunity that is not always naturally present.

549/ ICC response, supra note 389.

550/ ICC Response to U.S. Commission on Civil Rights Questionnaire, July 28, 1972.

Until mid-1973, CAB had assigned one staff person, on a part-time basis, the responsibility for implementing the provisions of Title VI and the Board's regulations thereunder.[551] However, the scope of the assignment was limited to receiving and reviewing the formal assurances of nondiscrimination required by CAB under the Civil Rights Act of 1964. This staff member left in 1973 and, as far as can be ascertained, there has been no replacement assigned responsibility in this area.[552] The Bureau of Enforcement is responsible for processing any complaints of discrimination in air carrier services and facilities.[553] Although CAB states that it is impossible to specify the exact amount of time spent by any member of the Bureau's staff on discrimination complaints, there are no staff members, at present, who spend a significant amount of their time on civil rights matters.[554] Whether it will make such assignments in the future, CAB indicates, depends largely upon the outcome of CAB's rulemaking proceeding on equal employment opportunity.[555]

551/ CAB Response to U.S. Commission on Civil Rights Questionnaire, August 7, 1972.

552/ In interviews and telephone conversations with CAB personnel, Commission staff were unable to discover any staff member who had been assigned Title VI responsibilities. Interview with Oral Ozment, Deputy General Counsel, CAB, June 21, 1973.

553/ No specific staff members are assigned to discrimination complaints. Rather, as in the case of any other complaint handled by CAB, Bureau of Enforcement investigators and attorneys are assigned to complaints on a case by case basis. CAB response, supra note 352.

554/ Id.

555/ Id.

FPC has acknowledged civil rights responsibilities only with reference to the prohibition of discrimination at recreational facilities located at licensed hydroelectric projects. Reviews of the facilities to assure compliance with these prohibitions and other violations of the law are conducted by FPC's regional offices.[556] FPC estimates that no members of its staff devote a substantial portion of their time to these civil rights duties.[557] Further, FPC indicates that there is no need to maintain an organizational mechanism for handling complaints of discrimination since it has received no civil rights complaints for 2 years.[558]

556/ For a discussion of FPC's responsibilities for nondiscriminatory service and complaint handling procedures, see Section IIC supra.

557/ FPC response, supra note 504. In a later letter to this Commission, FPC indicated that several senior staff personnel in Washington and at the regional offices do spend a substantial portion of their time dealing with the civil rights activities associated with the recreational facilities at licensed hydroelectric projects. Kidd letter, supra note 382. In response to a questionnaire from this Commission, however, FPC stated that the only personnel who devoted more than 25 percent of their time to civil rights duties were its internal equal employment opportunity staff. FPC response, supra note 504.

558/ Id.

SECURITIES AND EXCHANGE COMMISSION (SEC)

I. Introduction

The Securities and Exchange Commission is charged with the responsibility of administering several statutes[559] dealing with securities and securities markets.[560] The general objective of these statutes is to provide the fullest possible disclosure to the investing public and to protect the interests of the public against malpractice in the securities and financial markets.

The securities industry is particularly important because of the integral role it plays in the Nation's economy. The market value of all securities, including bonds on various domestic stock

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559 / The laws administered by SEC include the Securities Exchange Act of 1934, the Securities Act of 1933, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisors Act of 1940. SEC also acts as an advisor to the Federal courts in certain rehabilitation proceedings under the Bankruptcy Act.

560 / A "security" is any evidence of debt or ownership, especially a stock certificate or bond. The term is defined by the Securities Act of 1933 as

> any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. 15 U.S.C. § 77b.

exchanges, was $928 billion at the end of 1971. This represented a gain of $131 billion or 16 percent over the value reported a year earlier. The value of stocks listed on exchanges has had an upward trend for the past two decades and by 1972 was more than double the 1960 value of $335.3 billion.[561/]

Although SEC is not charged with specific direct civil rights enforcement responsibilities, certain of its activities carry significant civil rights implications. Most relevant among these are (1) a proposed requirement for equal employment rules for all brokerage firms, (2) SEC's requirement for disclosure of material information to the public, and (3) SEC rules and regulations on stockholders' use of the proxy proposal mechanism to submit civil rights issues for a vote of security holders.

II. Equal Employment Opportunity in the Securities Industry

A. The Industry Record

The securities industry is regulated by SEC and certain quasi-public organizations. Most of the large securities firms are members

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561/ SEC, Thirty-Eighth Annual Report (June 30, 1973).

of one or more of the 13 national securities exchanges, the largest of which are the New York Stock Exchange and the American Stock Exchange. Most securities firms are members of the National Association of Securities Dealers (NASD),[562] which is an association of brokers and dealers that acts as a self-regulatory organization in that it governs conduct in the over-the-counter securities market.[563]

The exchanges and NASD have adopted rules for the conduct of their members.[564] These rules relate primarily to dealings with

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562/ NASD is the only association of brokers and dealers registered with SEC pursuant to 15 U.S.C. § 78o-3. This section is an amendment to the law enacted in 1938 which provided for creation of a self-policing body among over-the-counter brokers and dealers. This measure authorizes the registration with SEC of an association of such brokers and dealers provided it is so organized as:

> to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market....

563/ The term "over-the-counter" securities refers to those securities which are not listed on any exchange but which have public trading markets.

564/ These rules are required by 15 U.S.C. § § 78f(b) and 78o-3(b)(5).

customers and with the other firms in the securities industry and are designed to promote "just and equitable principles of trade."[565] Further, they regulate employment by member firms of "registered representatives" who are required to pass examinations and to meet certain character qualifications. SEC has adopted rules regulating the conduct of securities firms which are not members of NASD.[566]

The securities industry has a poor record in the employment of minority group members generally and in the employment of women in positions above the clerical level. Employment statistics compiled from Form EEO-1 "Employer Information Reports" for 1971 filed with the Equal

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565/ To enforce this objective, 15 U.S.C. § 78f(b) requires that the rules of such an association also must provide for the disciplining of members (including suspension or expulsion) for misconduct. The establishment, maintenance, and enforcement of a voluntary code of business ethics are principal features of this provision of the law.

Generally, the rules concern the protection of the investors and the public rather than other aspects of the public interest such as nondiscriminatory treatment of minorities and women. For example, the rules govern such aspects of the operation of member firms as requirements for net capital levels, arbitration of disputes with customers, and the setting of commissions.

566/ 15 U.S.C. § 78o(b)(8). To equalize the regulatory pattern Congress provided in 1964 that SEC should undertake to establish investor safeguards applicable to non-NASD firms comparable to those applicable to NASD members. Among the controls adopted by SEC is a requirement that persons associated with non-NASD firms meet certain qualifications standards similar to those applied by NASD to its members. 15 U.S.C. § 78o(b)(8).

Employment Opportunity Commission (EEOC) illustrate the under-employment and underutilization of women and minorities in the securities industry, particularly in sales and management positions.[567] EEOC's national statistics on employment in the securities industry reveal that of 94,742 employees, only 5,484, or 5.8 percent, were Negroes, and that total minority employment constituted only 10,652 or 11.3 percent.[568]

These minority employees were heavily represented in clerical positions. A total of 8,530 of the 10,652 minority employees were classified as clerical employees and an additional 821 are in blue-collar jobs. Minority employees held 56.0 percent of all blue-collar jobs, 47.1 percent of all laborer jobs, and 62.5 percent of the craft positions. As against these percentages, blacks filled only 1.4 percent of the managerial positions. The disparity was even more striking in sales positions, where blacks held only 0.4 percent of the jobs, and all minorities held only 1.7 percent of the jobs.

The racial imbalance takes on added significance when it is recognized that jobs in the securities industry are heavily

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567/ The statistics used in this section were compiled from 1971 EEO-1 reports for the United States as a whole and for the New York Standard Metropolitan Statistical Area by the Office of Communication and the Task Force on Women in Church and Society of the United Church of Christ, the Task Force on Women of the United Presbyterian Church, U.S.A., and the National Organization For Women and reported in their Petition for Issuance of Rules before SEC. See pp. 195-98 infra for a discussion of this petition.

568/ Form EEO-1 defines minority as including Negroes, Orientals, American Indians, and Spanish surnamed Americans.

concentrated in New York City, which has a large black and Spanish surnamed population. Of the 94,742 persons employed by securities brokers and dealers throughout the United States, 53,063 or 56.0 percent were employed in the New York Standard Metropolitan Statistical Area (SMSA).[569] Of the 10,642 minority employees in the securities industry in the United States, 8,548 or 80.3 percent were employed in the New York SMSA. Although securities firms in the New York SMSA employed a higher percentage of minority group persons in all positions than were hired throughout the rest of the Nation (16.1 percent as against 5 percent), there was the same tendency to concentrate these employees in lower-grade positions.[570]

569/ The concept of SMSA was developed to meet the need for the presentation of general purpose statistics by agencies of the Federal Government in accordance with specific criteria for defining such areas. On the basis of these criteria, definitions of the areas in terms of geographic boundaries are established by the Office of Management and Budget. The New York SMSA includes New York City, composed of Bronx, Kings, New York, Queens, and Richmond Counties; Rockland County; and Westchester County, including the cities of Mount Vernon, New Rochelle, White Plains, and Yonkers. Nassau County, including the cities of Freeport, Hempstead, Long Beach, Rockville Centre, and Valley Stream, and Suffolk County were recently deleted from the New York SMSA and designated as a new SMSA. For the purposes of the statistics utilized in this report, however, they are included as part of the New York SMSA.

The New York SMSA has a total population of 11,571,899 with 7,894,862 or 69 percent living in New York City itself. Negroes constitute 16.3 percent of the population of the SMSA and 21.1 percent of the population of New York City. Persons of Spanish speaking background comprise 11.1 percent of the population of the SMSA and 15.2 percent of the city's population.

570/ Minorities constituted only 4.2 percent of the managers in the New York City SMSA as compared with 73 percent of the laborers.

The figures on employment of women were equally striking. Although women constituted 33.8 percent of the total industry work force, they held only 6.5 percent of the management positions compared with 56.2 percent of the clerical positions. In the New York SMSA, women held a slightly smaller percentage of the total jobs than they held nationally.[571/] Nevertheless, of 32 minority group women employed as managers in the entire United States, 26 were employed in the New York City SMSA and only 6 in the rest of the country.

It is recognized that traditionally the best route to top level positions or proprietary interests, i.e., participation in the profits of a firm, has been success in sales positions. Yet, women and minorities have been virtually excluded from sales positions. They held less than 5

571/ Of 53,063 positions in the New York SMSA, women held 16,879 or 31.8 percent and 15,093 or 89.4 percent of these positions are clerical. Further, women comprised only 5.9 percent of the 5,696 official and managerial positions.

percent and 1.7 percent, respectively, of the jobs in the sales category.[572]

B. Equal Employment Opportunity: Current and Potential Role of SEC

On September 28, 1972, three private organizations[573] filed with SEC a "Petition for Issuance of Rules" seeking rules to require "national securities exchanges, national securities associations and their members, and registered broker-dealers to take affirmative action to eliminate

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572/ Few minority group members or women are account executives or registered representatives. Sales positions are purported to be the positions in the industry most sensitive to the subjective criteria of customer acceptability. However, customer preference for a particular sex or race does not constitute a bona fide occupational qualification under Title VII of the Civil Rights Act of 1964. Thus, customer preference is not a valid justification for the exclusion of a sex or race from a job classification. Most registered representatives are hired from outside the organization and are trained to pass the necessary examination to fill the position. Few firms have any procedure under which their employees can compete for these positions or are even notified of their availability. This selection process leaves a gap in the procedure that many minorities and women would normally use for upward mobility within an organization. In addition, few firms utilize any objective qualifications for sales positions. An important criteria, however, is a demonstrated record of sales at the executive level, either with other securities houses or other marketers of products and services, a qualification which most minorities and women have been precluded from obtaining. Ultimately, the exclusion of minority employees and women from sales positions means that the majority male dominance of upper level positions is perpetuated, since these positions are the training ground for future management.

573/ The three organizations were the Office of Communication and the Task Force on Women in Church and Society of the United Church of Christ, the Task Force on Women of the United Presbyterian Church, U.S.A., and the National Organization for Women. Office of Communication of the United Church of Christ, et al, Petition for Issuance of Rules, Sept. 29, 1972.

discrimination in employment and to file annual reports thereon."[574] On December 14, 1972, SEC issued a release[575] which described the rulemaking petition and requested public comments on its authority to adopt such rules and on whether such rules were necessary or appropriate to serve the public interest or to protect investors.

SEC's action in seeking advice from the industry and the general public on whether it possessed the authority, and subsequently, the responsibility, to institute equal employment rules, constituted an

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574/ Id.

575/ A release requesting public comments may or may not reflect views endorsed by the SEC on a particular subject. Generally, a release announcing a proposed revision or requesting public comments does not involve the adoption or implementation of the matter; such releases do not have the effect of rules. Telephone interview with Neal McCoy, Chief Counsel, Division of Corporation Finance, SEC, Oct. 10, 1973.

unusual departure from the agency's procedures.[576] Further, by soliciting public comments on these questions, SEC interposed an extra, time-consuming step in the rulemaking process. A review by Commission staff of the comments received reveals that the majority were limited either to a discussion of the merits of adopting fair employment rules or to simple statements affirming support of fair

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576/ The normal procedure is for SEC to issue proposed rules or statements of policy in regulatory format for comment within a specified time. Final rules are issued after comments have been received and evaluated and any changes deemed necessary have been included. Thus, to request public opinion on its authority to propose rules constitutes a significant deviation from accepted procedure and could be interpreted as a singling out of the civil rights area for unusual treatment. SEC indicates, however, that:

> While the Commission does not often solicit public comments on the extent of its authority in particular areas, it has done so on a number of occasions, especially where it is proposed that the Commission extend its authority to areas or subjects that traditionally it has not regulated. Some recent examples include the Commission's request for public comments concerning the regulation of certain bank-sponsored investment programs (Securities Exchange Act Release No. 10761) (April 30, 1974), 29 F.R. 18163 (May 23, 1974)), and its request for comments from interested persons on policy questions raised by foreign access to the nation's securities markets (Securities Exchange Act Release No. 10634 (Feb. 8, 1974), 39 F.R. 6567 (Feb. 20, 1974)).
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> Furthermore, as pointed out below, there is a substantial question as to the extent and nature of the Commission's authority to act in this area and consequently, the Commission thought it advisable to obtain comments on that issue as well as upon the merits of the proposal. Under the circumstances, we do not believe that the treatment of this petition represented an unusual departure from the Commission's procedures since the proposal in no sense involved the familiar type of issues relating to the workings of the securities markets which is normally presented by the Commission's rulemaking proposals. Indeed, the Commission's action was fully consistent with the policy underlying the general rulemaking provisions set forth in Section 4 of the Administrative Procedure Act, as codified, 5 U.S.C. 553, which permits a solicitation of comments on general matters of concern that may be the subject of agency action as well as specific rules the agency proposes to adopt. Letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, from George A. Fitzsimmons, Secretary, SEC, Sept. 30, 1974.

employment practices. Very few touched on the question of SEC's legislative authority to institute the rules.

On January 14, 1974, SEC concluded the rulemaking procedure and issued a decision not to adopt equal employment rules for national security exchanges and associations and registered broker dealers.[577] The ruling indicated the agency's determination that the evidence of discrimination in the industry did not present persuasive proof of the appropriateness or necessity of the proposed rules. Further, SEC expressed its view that any such rules would be duplicative of existing law and the activities of the Equal Employment Opportunity Commission.[578]

It is clear that SEC possesses ample statutory authority to enact prohibitions against discrimination.[579] That Congress intended SEC to have broad authority to regulate all kinds of conduct in the securities industry is

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577/ SEC Release No. 34-10597, Jan. 14, 1974.

578/ While SEC declined to adopt the rules proposed by the United Church of Christ and others, it indicated in its letter to counsel for the United Church of Christ that it had asked the securities industry self-regulatory organizations to keep it informed concerning the progress their members and they make in furtherance of the goal of eliminating employment discrimination.

579/ See, Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Ronald F. Hunt, Secretary, Securities and Exchange Commission, Mar. 14, 1973. The Commission expressed the opinion that SEC has both the authority and the obligation to adopt rules governing the equal employment opportunity practices of its regulatees.

> Section 6 and 15 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f and 78o condition registration by national securities exchanges, brokers and dealers upon the submission of information which SEC, by its rules requires as being "necessary or appropriate in the public interest." At this point in our nation's history there can be little question but that the assurance of equal employment opportunities in all sectors, particularly in an industry constituting an integral part of interstate commerce, is essential to the public interest.

evidenced by (1) the congressional finding that the securities industry is "affected with national public interest" [580] and (2) the frequent references throughout the Securities Exchange Act to SEC's authority to make rules and regulations "necessary and appropriate" both "in the public interest" and "to protect investors." [581]

Fair employment, a goal to which a significant national commitment has been made, is clearly such a "public interest." Further, it is imperative to the public interest for SEC to ensure that the business

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580/ 15 U.S.C. § 78f(a)(2).

581/ 15 U.S.C. § § 78f(a)(2), 78o(b)(2), 78o-3(b)(10), 78o-3(a)(i), 78o-3(x)(2).

practices of the marketplace are not tainted by illegal behavior.[582] The courts have upheld the authority of regulatory agencies to consider other social concerns, even if the agency's authorizing statute does not expressly require such considerations. Judicial decisions, for example, have enunciated the duty of regulatory agencies to implement national labor management policies,[583] antitrust policies,[584] and policies for the protection of public health.[585]

582/ Employment discrimination is proscribed by Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, the Equal Pay Act of 1963, Executive Order 11246, as amended by Executive Order 11375 and Federal agency guidelines. Further, it runs counter to the fundamental constitutional principle of equal protection.

583/ Retail Store Employees Union v. Federal Communications Commission, 436 F.2d 248 (D.C. Cir. 1970).

584/ Northern Natural Gas Co. v. Federal Power Commission, 399 F.2d 953 (D.C. Cir. 1968).

585/ Banzhaf v. Federal Communications Commission, 405 F.2d 1082 (D.C. Cir. 1968).

The exclusion of minorities and women from representation throughout the structure of this important industry operates as an effective limit on the access of these groups to capital and investment opportunities. Since there are few, if any, women or minorities among the decisionmakers in the industry, members of these groups seeking to participate in the benefits of securities firms by either investing or borrowing will generally be dealing with an Anglo male. Although sensitivity to the concerns of minorities and females is not limited to members of these groups, the difficulties historically encountered by minorities and women in obtaining investment capital are direct outgrowths of the current employment situation.[586] As was stated by the United Church of Christ in its petition for equal employment rules:

> An investment banker who has no contacts in a minority community, no relationships with its economic institutions, no familiarity with its business organizations, and no sense of "feel" for its investment opportunities can scarcely be expected to participate in financing its established business, much less venture situations. By the same token, a business organization which sees women as solely objects for romance, protection and domestic service is not likely to provide financing to or recommend investments in businesses run by women.[587]

586/ The obvious correlation between the employment practices of a company and the services the company renders to customers was noted by the Federal Communications Commission when it issued equal employment guidelines for telephone and telegraph companies: "It would seem evident that a company which follows discriminatory employment practices would find it difficult to provide nondiscriminatory services." Federal Communications Commission, Non Discrimination in Employment Practices of Communications Common Carriers, 19RR 2d 1852, 35 Fed. Reg. 12892 (1970)

587/ Office of Communication, United Church of Christ, Comments of Petitioners on Petition for Issuance of Rules (January 1973).

Thus, the exclusion of minority group members and women from responsible positions in the securities industry has consequences far beyond the jobs involved. It is an important element in the formula which perpetuates broader forms of economic discrimination.

SEC, in its decision not to issue equal employment guidelines, indicated that it would need a demonstration that efforts by civil rights agencies were not adequate.[588] This is a spurious argument. These agencies are charged with overseeing more than 40 million employees, have only limited resources and remedies at their disposal, and have not done an effective job combating job discrimination.[589] Any efforts by SEC to augment their activities would serve to move this Nation more expeditiously to

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588/ SEC Release, supra note 578. In a recent letter to this Commission, SEC also stated that its decision not to prohibit discrimination by the securities industry is predicated on its belief that its authority to do so "appears to be both unclear and, to a degree, limited...." SEC's letter further concluded that this perceived lack of legal basis for equal employment opportunity rules;

> has some bearing upon whether, or not the extent to which the Commission should divert its resources and energy away from the fields with respect to which it has a clear and unquestioned mandate from Congress, that is, protection of investors and the furtherance of fair, informed and orderly securities markets.
>
> We are also influenced by the fact that there are other federal agencies, such as the Equal Employment Opportunity Commission, which have a clear mandate, direct authority, and undivided responsibility for progress in the area of equal employment opportunity. We recognize, of course, that the burden of these agencies is a heavy one and that they need assistance in order to accomplish their objectives. Nevertheless, the fact remains that the primary responsibility within the federal government for this problem has been assigned elsewhere. Fitzsimmons letter, supra note 576

589/ See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort ch. 2 (1971) [hereinafter cited as Enforcement Effort report], and U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--A Reassessment ch. 2 (1973) [hereinafter cited as Reassessment report].

the realization of equal employment opportunity.[590/]

III. Disclosure of Information

A. Civil Rights Responsibilities

The Securities Act of 1933 and the Securities Exchange Act of 1934 require the filing of registration statements and periodic followup reports with full and fair disclosure of all pertinent facts by any company wishing to sell stock to the public.[591/] Registration of

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590/ The Equal Employment Opportunity Commission advised SEC that it welcomed participation by other Federal agencies. SEC Release, supra note 577.

591/ The Securities Act of 1933, in general, requires that before securities may be offered to the public, a registration statement must be filed which discloses prescribed categories of information or an exemption must be available. Whenever a company has a new stock issue for public sale, a separate registration statement shall become effective on the 20th day after filing or on the 20th day after the filing of the last amendment. An effective registration statement or an exemption is a prerequisite for public sale of the securities.

The Securities Exchange Act of 1934 deals in large parts with securities already outstanding and requires the registration of securities listed on a national securities exchange or, with certain exceptions, securities held by over 500 shareholders when the issuer has total assets exceeding one million dollars. Issuers of registered securities must file annual and other periodic reports designed to provide files of current material information.

securities does not imply that SEC has approved the securities or that it has reviewed all registration statements for adequacy. The registration requirement does not insure investors against loss in their purchase but serves rather to provide information upon which investors may make an informed and realistic evaluation of the worth of the securities.[592]

To facilitate the registration and periodic reporting of securities by different types of issuing companies, SEC has prepared special forms which vary in their requirements to provide disclosure.[593] Certain provisions of the registration and other reporting forms[594] require the company to describe its business and to make disclosure

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592/ SEC is powerless to pass upon the merits of securities, and assuming proper disclosure of the financial and other information essential to informed investment analysis, SEC cannot bar the sale of securities where its analysis may show the issue to be of questionable value. Interview with Neal McCoy, Chief Counsel, Division of Corporation Finance, SEC, July 24, 1973.

593/ Under the Securities Act of 1933, the forms most commonly used are Form S-1, the initial registration statement, and Form S-7, a registration statement for companies which have established records of earnings and stability of management and business. The forms most used under the Securities Exchange Act of 1934 are Form 10, a general form for the registration of commercial and industrial companies; Form 10-K, an annual report to be filed within 90 days after the end of the fiscal year, Form 10Q, a financial report to be filed quarterly throughout the fiscal year, and Form 8-K, a monthly report, which is required 10 days after the end of any one month in which one of the events requiring disclosure occurred.

594/ The pertinent items in the forms are: under the Securities Act of 1933, Form S-1 (Item 9 and 12) and Form S-7 (Item 5); under the Securities Exchange Act of 1934, Form 10 (Items 1b and 10), Form 10-K (Items 1 and 5) and Form 8-K (Item 3).

of any pending material legal proceedings, other than routine litigation incidental to the business in which it is involved.

The term "material" is defined by rule to include information as to which an investor ought to be informed before purchase of the registered securities.[595] SEC has provided, in the instructions for registration statements and periodic reports, guidelines to registrants on tests for materiality of other than routine litigation. Where a company does not report such legal proceedings, it generally is required to provide SEC with supplemental information explaining why the proceedings are not material. While these requirements do not expressly cover civil rights matters, they have been so interpreted by SEC. In July 1971, SEC stated that companies should disclose any proceeding relating to civil rights which would be material to the economic position of the

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595/ The term "material" is defined in Rule 405 under the Securities Act, 17 C.F.R. § 230.405, as follows:

> The term "material" when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered.

Rule 12b-2 of the Securities Exchange Act, 17 C.F.R. § 240.12b-2, defines "material" in virtually the same language. Individual forms also set forth a specific standard for measuring the materiality of litigation which involves primarily a claim for damages. The standard, as amended, is set forth in Securities Act Release 5386.

companies.[596] Information concerning civil rights matters which is included in registration statements and in periodic reports is publicly available. Copies of prospectuses contained in registration statements for new issues of securities are required to be provided to purchasers of the securities. The periodic reports submitted by companies are also on

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596/ In reference to civil rights disclosures, Securities Act Release No. 5170 reads in part:

> The Commission's requirements for describing registrant's business in the forms and rules under the Securities Act and Exchange Act call for disclosure, if material, when legal proceedings arising under statutory requirements relating to Civil Rights would, for example, result in the cancellation of a government contract or termination of further business with the government. Moreover, the proceedings call for disclosure, if material, of proceedings arising, for example, under the Civil Rights Act, any debarment or other sanctions imposed for violation of the non-discrimination rules of any Federal regulatory agency whenever such actions are material. If such legal proceedings are pending or known to be contemplated by government agencies but disclosure thereof is omitted on the ground that it is not material, it is the practice of the Division of Corporation Finance to request registrants to furnish as supplemental information and not as part of the filing, (1) a description of the omitted information and (2) a statement of the reasons for its omission.

In an earlier report, this Commission had urged the development by SEC of such guidelines for civil rights disclosures:

> The SEC offers no specific guidance with respect to civil rights related issues which should be reported. There is a need for the Agency to issue such guidelines setting forth the types of action to be reported, including, but not limited to, judicial or administrative actions in the civil rights area against the registrant. Enforcement Effort report, supra note 247 at 300.

file at SEC and can be examined by the public.[597/]

Prior to 1973, litigation which involved a claim for damages was deemed material if the claim, exclusive of interests and costs, exceeded 15 percent of a company's current assets. Then, in April of that year SEC reduced the economic standard for materiality of litigation to 10 percent of current assets.[598/] Although SEC's action dealt specifically with environmental problems,[599/] the reduction in the test for materiality applied to all forms of litigation, including civil rights litigation.

597/ Duplicated copies of these reports can also be obtained by the public upon request with the payment of costs of the duplication. Supplemental information furnished to SEC, but not required to be included in the forms, including the supplemental information provided by companies with respect to civil rights matters, is not publicly available.

598/ SEC Release No. 5386, Apr. 20, 1973. The new criteria became applicable on July 3, 1973.

599/ The SEC action was taken in response to the National Environmental Policy Act (NEPA). SEC noted that Section 105 of NEPA states that the policy and goals set forth therein are supplementary to those in existing authorizations of Federal agencies. It was SEC's opinion, after consideration of public comments, that the amendments would promote investor protection and at the same time promote the purposes of NEPA.

At the same time, SEC also amended its rules to require registrants to make more meaningful disclosures relating to the protection of the environment. Companies must now report on the extent to which their business is affected by compliance with Federal, State, and local environmental protection laws and regulations. 600/ Although the reporting of civil

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600/ The amendments to the requirements for the description of business items emphasize the possible future effect of environmental statutes and regulations, and proceedings thereunder, on the issuer, and they specify the information to be furnished in connection with the description of business.

The amendments to the instructions for the litigation items now state that administrative or judicial proceedings arising under any Federal, State, or local provision which regulates the discharge of materials into the environment or which otherwise specifically relates to the protection of the environment, shall not be considered "ordinary routine litigation incidental to the business." (Emphasis added.) Any such proceedings by a governmental authority are deemed material and shall be described whether or not the amount of any claim for damages involved exceeds 10 percent of current assets on a consolidated basis and whether or not such proceedings are considered "ordinary routine litigation incidental to the business."

SEC also amended the litigation items in Forms S-1, 10, 10-K, and 8-K to require companies to furnish a description of the factual basis of the proceedings and the relief sought. Proceedings which are similar in nature may be grouped and described if such proceedings in the aggregate are material to the business or financial condition of the registrant. SEC Release, supra note 596.

rights disclosures in business description and litigation items could be facilitated by similar specific guidelines, SEC's position is that its rulemaking authority is not sufficient to institute such action and that legislative approval would have to be granted.[601/]

B. Monitoring Civil Rights Disclosures

Registration statements are examined by SEC's Division of Corporation Finance for compliance with the disclosure requirements. The Division is organized into 19 processing branches with 15 involved in filings by all types of industrial companies, three with investment company filings, and one branch with oil and gas drilling programs. In each case a registrant's filing is reviewed by one of the Division's staff examiners under the supervision of a branch chief. Although SEC indicates that almost all members of the Division's professional staff, at one time or another, are involved in the review of civil rights disclosures, no staff members spend more than 25 percent of their time on civil rights matters.[602/]

601/ McCoy interview, supra note 592. In a recent letter to this Commission, SEC also indicated that the agency questions the necessity for adopting more specific guidelines for civil rights disclosures, since this would be duplicative of existing laws and its staff is otherwise utilized more effectively. Fitzsimmons letter (attachment) supra note 576.

602/ SEC Response to U.S. Commission on Civil Rights Questionnaire, June 15, 1973 /hereinafter referred to as SEC response/.

The Division employs four different review procedures in examining registration statements. A branch chief will do a preliminary scanning of the statement and determine what type of review it should receive. The first category of procedures, a deferred review, comes into operation when a supervisory staff official decides that the statement is so poorly prepared or otherwise presents problems so serious that review should be deferred. Registrants are notified and it is their responsibility to go forward, withdraw, or amend the statement. In the second type of review, a cursory review, the staff makes a limited review of the statement and advises the registrant that no written comments will be provided. Under normal practice, a registration statement usually becomes effective after SEC's receipt of assurances from the officers of the issuer that they are aware that only a cursory review was conducted and that they are nevertheless responsible for complete disclosure of material information as required by the Securities Act. In a summary review, SEC staff perform a limited analysis of the registration statement and provide written comments to the registrant on any deficiencies identified. A registration statement will become effective after receipt of the same assurances required in cursory reviews as well as assurances of the issuer's compliance with the staff comments. In the final category, customary reviews, registration statements are subject to a more complete analysis of accounting, financial, and legal elements. When analysis reveals that a statement is materially incomplete or inaccurate, the registrant is so informed by letter and given an opportunity to file correcting or clarifying

amendments. The deficiencies must be corrected before SEC will accelerate the effectiveness of a registration statement.[603]

Prior to November 1968, all registration statements received customary reviews, but the high volume of filings forced the Division to take steps to curtail the time involved in passing on registration statements.[604] Notwithstanding the type of review applied to a registration statement, the statutory burden of disclosure is on the issuer. Thus, although the initial review may not disclose deficiencies or incorrect items in a statement,[605] a company may still be held to have violated the Federal securities laws if deficiencies are later found to exist. Further, SEC can revoke or suspend the effectiveness of a registration.[606]

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603 / The statutory scheme is described in note 591 supra.

604 / During the first half of fiscal year 1972, 1,632 registration statements were filed as compared to 1,193 for the same period in fiscal year 1971. Of the fiscal year 1972 filings, 632 represented first-time filings by issuers who had never been subjected to the registration process and generally required a more time-consuming review by the staff. In the first half of fiscal year 1971 there were only 352 first-time filings. The Division's workload also has been materially increased by the number of reports and other documents filed under the Securities Exchange Act. For example, annual reports on Form 10-K in fiscal year 1971 reached a level of 8,319, as compared to 6,064 in fiscal year 1969. Notwithstanding this burgeoning workload, the Division's staff has not increased to any significant extent. SEC Release Nos. 4934 (Nov. 21, 1968) and 5231 (Feb. 3, 1972).

605/ The review process contributes to the general reliability of the registration disclosures, but it does not give positive assurance of the accuracy of the facts reported. SEC believes that even if such a verification of the facts were possible, the task, if not actually prohibitive, would involve such a tremendous undertaking (both in time and money) such as to impede seriously the financing of business through the public sale of securities. McCoy interview, supra note 592.

606/ SEC has authority to refuse or suspend the effectiveness of any registration statement if it finds after holding a hearing that material representations are misleading, inaccurate, or incomplete. In addition, the law provides an investor with recovery rights, which must be asserted in an appropriate Federal or State court if he or she can prove that there was incomplete or inaccurate disclosure of material facts in the registration or prospectus.

The Office of Disclosure Policy and Proceedings, Division of Corporation Finance, receives all registration statements, periodic reports, and supplemental information from the various processing branches which contain civil rights disclosures. On February 21, 1973, the Office instituted a system to record the relevant information on civil rights disclosures and for this purpose developed an intra-office form (SEC Form 1247 Disclosure of Civil Rights Matters). The form is divided into three categories: (1) information included in description of business; (2) information included in legal proceedings; and (3) information provided supplementally. 607/

607/ The instructions for filing supplemental information with respect to civil rights proceedings, which are found in Securities Act Release 5170, indicate that the registrant should "furnish as supplemental information and not as part of the filing (1) a description of the omitted information and (2) a statement of the reasons for its omission." The term "supplemental statements" or "supplemental information" refers to any correspondence other than the prescribed forms furnished by the company or its counsel or accountants to SEC staff. As noted previously, such information is not public. There is no specific format for supplemental statements. SEC traditionally has not undertaken to provide any checklist for identifying potentially "material" matters which could become the subject of supplemental statements. Supplemental information, whether furnished voluntarily by or on behalf of a company or in response to staff requests, is reviewed by the staff examiner to determine if there is a reasonable basis to conclude that the disclosure need not be included in the registration statement. SEC response, supra note 602.

In the first 4 months since the institution of the monitoring system, four companies made civil rights disclosures in forms filed with SEC 608/ and 11 companies filed supplemental information with respect to proceedings which were not disclosed because they were deemed immaterial.609/ These figures compare with 3,712 Securities Act registration

608/ Two companies, General Public Utilities Corporation and Union Planters Corporation, disclosed suits by EEOC under Title VII of the Civil Rights Act of 1964 involving race and sex discrimination. Two additional companies, Baxter Laboratories and Union Camp Corporation, disclosed private class action suits, under Title VII, charging race discrimination.

609/ The following companies provided supplemental information concerning charges by EEOC under Title VII; General Public Utilities Corporation, the Singer Company, Robertshaw Controls Company, American Electric Power Company, the Case-Hoyt Corporation, and the Upjohn Company. In all cases no disclosure was made in the filing involved because the proceedings were deemed to be immaterial. Ranco Incorporated reported the filing of three allegations by employees with the Ohio Civil Rights Commission alleging race discrimination. These claims were deemed immaterial because the only relief requested was personal relief for the three individuals and no money was involved. Pacific Lighting Corporation and National Distiller and Chemical Corporation provided supplemental information on private suits under Title VII against subsidiaries which were not material to the overall operations of the parent. Reynolds Metals and Wheelabrator-Frye, Inc., provided supplemental information concerning private charges of race discrimination which were not deemed to be material. The immateriality of all of these proceedings was concurred in by SEC. SEC response, supra note 602.

statements declared effective in fiscal year 1972 and 3,281 in fiscal year 1973. There were 1,393 registration statements under the Securities Exchange Act filed in fiscal year 1972 and 1,431 filed in fiscal year 1973. 610/

Basically, decisions on the materiality of litigation and whether to disclose litigation in registration statements or reporting forms or, as an alternative, to provide supplemental information explaining an omission are made by the registrants. The economic standard for materiality, i.e., litigation involving a claim for damages exceeding 10 percent of current assets, is usually too high to be relevant to civil rights litigation. Further, even if a legal proceeding does meet the economic standard, information need not be given if it is a registrant's determination that the proceeding is "ordinary routine litigation incidental to the business."

SEC may determine, however, that litigation should be disclosed as "material" even though it may not primarily involve a claim for damages meeting the economic standard. For example, the significance of EEOC's complaint charging discrimination against the American Telephone and Telegraph

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610/ In reference to the annual and periodic reporting requirements of the Securities Exchange Act, SEC in fiscal year 1973 received 49,596 reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K. Fitzsimmons letter (attachment), supra note 576.

Company (AT&T), even though voluntarily disclosed by the company in its initial filing, could otherwise have led SEC to determine that the litigation was, indeed, material.[611]

C. Enforcement Procedures

SEC has several remedies at its disposal to insure compliance with its regulations for complete disclosure. The statutes authorize SEC to utilize the legal remedies of civil injunctions, criminal prosecution, and various administrative remedies.[612] The first two sanctions may be applied to any person who is involved in securities transactions in violation of the law, whether or not he or she is engaged in the securities business. Among the wide variety of remedies available to SEC are those in connection with exchange or association members,

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611/ AT&T disclosed information on the EEOC complaint in a prospectus for an exchange offer dated December 5, 1972. The prospectus stated in part:

> Allegations of "unlawful discrimination in employment against women, blacks, Spanish-surnamed Americans, and other minorities" by the Bell System Companies are the subject of a proceeding brought before the Federal Communications Commission by the Equal Employment Opportunity Commission and joined by others. In the proceeding it is claimed, among other things, that certain persons are entitled to monetary relief for past violations. Letter from J. Rowland Cook, Chief Interpretative Counsel for Forms, Rules, Regulations and Legislative Matters, SEC, to Pat Villareal, Equal Opportunity Specialist, U.S. Commission on Civil Rights, Oct. 11, 1973.

612/ Assuming that the facts show possible fraud or other legal violations the laws provide several courses of action or remedies which the Commission may pursue:

(a) Civil injunction. The Commission may apply to an appropriate U.S. district court for an order enjoining those acts or practices alleged to violate the law or Commission rules.

(b) Criminal prosecution. If fraud or other willful violation of law is indicated, the Commission may refer the facts to the Department of Justice with a recommendation for criminal prosecution of the offending persons.

(c) Administrative remedy. The Commission may, after hearing, issue orders suspending or expelling members from exchanges or over-the-counter dealers associations.

registered brokers or dealers, or individuals who may associate with any such firm. Other administrative remedies include SEC's power to issue stop orders which suspend or revoke the effectiveness of a registration statement, which remedy has the most immediate effect on a company since it effectively prohibits the progress of the offering. However, SEC has infrequently found it necessary to invoke any of these powers in order to obtain compliance[613] and it has never invoked them with regard to a civil rights related matter.

The usual way that SEC learns of a registrant's involvement in a civil rights action is through the filing by the registrant of one of the forms requiring disclosure of such events. SEC has not sought information from minority group and women's organizations involving registrants, although it has infrequently been apprised of a registrant's involvement through the voluntary submission of such information by members of the public. Occasionally, the staff might learn of such action through the announcement of the suit in the media, for example, the AT&T case.

SEC has not yet taken the desirable step of requesting lists of companies involved in civil rights proceedings from the Federal offices involved in litigation in this area, such as the Equal Employment Opportunity Commission (EEOC), Office of Federal Contract Compliance (OFCC), and the Department of Justice (DOJ). In the past SEC has taken the position that the cost in money and staff time for such a monitoring project would be prohibitive.[614]

613/ In fiscal year 1972, SEC issued five stop orders against registration statements filed under the Securities Act, and three were issued in fiscal year 1973. Cook letter, supra note 611.

614/ McCoy interview, supra note 592.

A program, however, whereby SEC periodically checked disclosures against lists of proceedings from EEOC, OFCC, and DOJ would not seem to require the expense of more than a limited amount of staff time. In addition, a small additional investment of time could be used to establish coordination with private civil rights groups to ensure a complete monitoring of registrants' adherence to SEC regulations.[615] SEC has instructed its staff to consult with EEOC, OFCC, DOJ, and other governmental agencies to determine the feasibility of such a monitoring program.[616] In September 1974, it indicated, however, a continued unwillingness to affirmatively seek information from private civil rights groups.[617]

IV. Proxy Proposals Relating to Civil Rights

The proxy proposal mechanism allows shareholders to bring issues relevant to the management of a corporation to the attention of other stockholders. In 1942, SEC adopted rules requiring the subject matter of proxy proposals to be a "proper subject for action."[618] SEC's exclusion of "general economic, political, racial, religious, social or similar causes," from its definition of "proper subject"[619] operated as an effective obstacle to the submission of civil rights oriented proposals. On

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615/ As this Commission previously noted, the bulk of civil rights litigation is instituted by private parties. Therefore, contact should be made with representative private civil rights groups. Reassessment report, supra note 247, at 123.

616/ Fitzsimmons letter, supra note 576.

617/ Id. SEC stated "the practicability of such a program appears somewhat less with respect to private civil rights groups because of the difficulties in identifying appropriate groups and the likelihood that their information would be duplicative of that received from other governmental agencies." Id. This statement overlooks the fact that most equal employment litigation is brought by private parties and that there are a few key organizations, e.g., NAACP Legal Defense and Educational Fund, Inc., the National Organization for Women, and the Mexican American Legal Defense and Education Fund, which initiate much of the litigation and which are aware of most of the other cases in which they are not parties

618/ 17 C.F.R. § 240.14a-8(c)(2). What is a "proper subject for action" is a matter to be determined by State law.

619 Letter from Hugh F. Owens, Commissioner, SEC, to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, July 24, 1970.

September 22, 1972, as previously recommended by the Commission on Civil Rights,[620] SEC amended the proxy proposal rules.[621]

The effect of the amendment was to liberalize the guidelines governing the subject matter which could be raised by stockholders. The revised rules allow a company to omit a security holder's proposal if it consists of a recommendation, request, or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer. Therefore, stockholders are now free to introduce proposals of civil rights importance, such as those which challenge corporate employment policies or seek to increase the social awareness of a company.

Proxy proposals must be submitted to the company management for a decision on whether to include the proposal with the official proxy material.[622] The proposals are then forwarded to SEC by companies and, if a company decides to omit a shareholder proxy proposal, the Division

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620/ In recommending the relaxation of the rules governing proxy proposals, this Commission stated in 1971:

> If the SEC should liberalize its current definition of "proper subject" to permit socially motivated stockholders to introduce proposals of civil rights importance, the potential impact could be overwhelming. The issues susceptible to resolution by the stockholder proxy mechanism are far-reaching.... Further, even in those cases where such proposals are not adopted by the stockholders, the introduction and full discussion of their merits could stimulate greater corporate concern and activity. Enforcement Effort report, supra note 247, at 300, 301.

621/ The amendments to Rules 14a-5 and 14a-8 of SEC's proxy rules were adopted pursuant to Sections 14(a) and 23(a) of the Securities Exchange Act of 1934, SEC Release No. 9784, Sept. 22, 1972.

622/ If the company opposes a security holder's proposal, it is required, if requested by the security holder, to include in its proxy statement a statement of the security holder not exceeding 200 words in support of the proposal. SEC Release No. 9784, Sept. 22, 1972.

of Corporation Finance has responsibility for reviewing this decision. With respect to such proposals, SEC's staff determine whether management's reasons for exclusion are consistent with the proxy rules. If a determination is made that the proxy rules do not support a company's decision to exclude a proposal, the Division's staff notifies the company of the decision and can recommend that SEC initiate enforcement action if the proxy material is used without including the proposal in question.[623/] Stockholders may also challenge the exclusion of proxy proposals by instituting civil actions.

In a related action, SEC amended its rule on the availability for public inspection and copying to extend to materials relating to proposed omission of a security holder's proposal from proxy material. This amendment facilitates the exercise of rights by individuals who wish to take private action against the company's decision.

SEC monitors proxy proposals to assure compliance with its rules but does not record on a continuing basis the number of proposals which have been included in proxy material without dispute.[624/] Accordingly, no information is available on how many, if any, of these proposals concerned civil rights matters. During fiscal year 1973, the Division of Corporation Financed received nine shareholder proposals relating to civil rights matters,

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623/ The staff's actions on proposals do not purport to adjudicate the merits of the management's posture with respect to the proposal; only a Federal district court can decide whether management is obligated to include a proposal in its proxy material, and such action can be instituted by SEC or by the proponent security holder.

624/ The source material needed to provide information on noncontested proposals is not usually collected until after the end of the fiscal year. SEC response, supra note 46. During the 1972 fiscal year, 411 proposals submitted by 53 stockholders for action by stockholders' meetings were included in the proxy statements of 193 companies. A total of 234 additional proposals submitted by 50 stockholders were omitted from the proxy statements of 63 companies. SEC Annual Report, supra note 561.

the inclusion of which was contested by company management.[625] Four of the contested proposals were included in proxy statements after the Division issued opinions that the management could not rely on SEC rules as bases for omitting the proposals.

V. Other Civil Rights Activities of SEC

SEC has been active in holding prefiling conferences and issuing

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625/ Of the nine civil rights proposals, those submitted in connection with the proxy statements of First National Boston Corporation, Newmont Mining Corporation (two proposals), and American Metal Climax were included in the proxy. Those submitted in connection with the proxy statements of Travelers Corporation, Hartford National Corporation, Associated Spring Corporation, C.B.T Corporation, and United States Steel Corporation were omitted.

The subject of the proxy proposals included resolutions that qualified minority group members fill any upcoming vacancies on the boards of directors of several corporations and a proposal to direct a corporation to terminate its trade with Namibia (South-West Africa) because such investments serve to strengthen the alleged illegal control now exercised by the South African Government.

Of particular civil rights interest is a proposal submitted by the United Church of Christ and the United Church Board for Homelands Ministeries to the Newmont Mining Corporation:

> Be it resolved that in its operations abroad, the Corporation will practice principles of fair employment, including equal pay for comparable work, equal employees benefit plans, equal treatment in hiring, training, and promotion, and equal eligibility to supervisory and management positions, without regard to race, sex, or religion. In any country where local laws or customs involve racial discrimination in employment, the Corporation will initiate affirmative action programs to achieve meaningful equality of job opportunity.

interpretative rulings to minority business groups which desire to raise capital. For example, the North Lawndale Economic Development Corporation consulted with the staff of SEC in several prefiling conferences which led to the preparation and filing of its registration statement. In another instance, an attorney in the Division of Corporation Finance met with persons who proposed to establish a savings plan for Skycaps at the major airports. The group proposed to establish a company which would make investments in airport-related concessions and activities and which would be entitled to certain benefits under the Small Business Administration's minority business programs. The applicability of the Federal securities laws to the proposed offering was discussed as a means of affording the promoters a general background upon which further planning might be based.

From time to time over the past several years, the staff of SEC has presented or participated in programs at Howard University in Washington, D.C., which has a predominantly black student body. For example, the chief of the Division's Branch of Small Issues met on several occasions during 1973 with classes and seminars at Howard. The sessions included presentations to law classes and financial seminars open to law students and business students, designed to furnish information concerning the means by which minority enterprises might raise money through the exemptive provisions of Regulation A under the Securities Act. Regulation A provides that offerings of securities not exceeding $500,000 may be exempted from registration, subject to such provisions as the Commission prescribes for the protection of investors.[626/] This allows small companies and minority entrepreneurs freedom from the extensive paperwork and legal expenses involved in registration with SEC.

626/ SEC response, supra note 602.

Chapter 1

FINDINGS

Federal Communications Commission (FCC)

1. The Federal Communications Commission is an independent regulatory agency with broad responsibilities for the regulation in the public interest of radio and television, cable television, and telephone and telegraph communications.
2. It is the only regulatory agency to adopt rules prohibiting employment discrimination by its licensees. Although this action by FCC has had some positive impact on the availability of positions for minorities and women in the broadcasting, telephone, and telegraph industries, the agency has not effectively enforced its equal employment regulations.
3. Deficiencies in FCC's enforcement of its rules are as follows:

   a. The job categories utilized by FCC in the annual employment reports required of licensees are too broadly defined and are not based on actual positions in the industries; it is, therefore, extremely difficult to determine from the forms the nature of the positions occupied by minorities and women.

   b. FCC's guidelines for licensees' equal employment opportunity programs lack specificity and are not result oriented. For example, they omit key elements such as a requirement that licensees develop a utilization analysis and goals and timetables.

   c. The resolution of complaints receives a low priority in FCC's monitoring of its nondiscrimination prohibitions. Further, the agency

has not developed an effective mechanism to handle civil rights complaints.

d. FCC's reviews of the employment patterns of radio and television stations at the time of license renewal are designed to identify licensees with severe underutilization of women and minorities. The criteria used to identify these stations, however, are overly restrictive, tend to focus on small stations, and ignore a number of relevant factors.

e. FCC's activities to effect equal employment within the telephone and telegraph industries have benefitted from the precedent-making resolution of the Equal Employment Opportunity Commission's discrimination complaint against the American Telephone and Telegraph Company (AT&T). Nevertheless, the FCC has not implemented a program to monitor the compliance of all telephone and telegraph licensees.

f. Since late 1973, FCC has been in the process of developing new and comprehensive procedures which are aimed at correcting the deficiencies in its civil rights compliance program pertaining to broadcasters. Similarly, FCC has long been considering proposals to incorporate the results of the AT&T action into an ongoing compliance program for all telephone and telegraph licensees.

4. Despite a large number of requests to do so, FCC has designated for hearing only a few petitions to deny license renewal which were based on civil rights grounds. Without a hearing, challenging groups have no access to the comprehensive data on a licensee needed to determine the underlying reasons for disparities in employment and programming.

5. FCC's rulings in competitive proceedings for award of a license tend to block new competition for licensees and preserve the status quo, thus continuing the exclusion of minority groups from ownership of communications media outlets. The agency's policy, however, may be affected by a recent court decision ordering FCC to give consideration to minority applicants in some competitive proceedings.
6. FCC has instituted an innovative and useful program of holding meetings to allow representatives of minority, female, and industry groups to present informally their views concerning problems in the broadcast field.
7. In 1973, FCC established a special unit to coordinate the agency's enforcement of its rules prohibiting its licensees from discriminating in employment. The unit's activities have been limited to involvement in the agency's efforts to improve its civil rights program as it relates to radio and television broadcasters, and to providing assistance in FCC's meetings with minority, women's, and industry organizations. Although the Commissioner who suggested the creation of the Unit recommended that it report directly to the Commission, it was placed under the control of the General Counsel. Its only power is to make recommendations; thus, it has no authority to approve or reject civil rights activities of the various bureaus in the agency. Further, its professional staff is limited to two persons, hardly an adequate number to deal with the important civil rights issues facing FCC.
8. The complicated nature of regulatory proceedings does not facilitiate participation by the public. This lack of participation adversely

affects minorities and women. FCC, however, continues to refuse to provide free legal counsel or services to those who wish to challenge regulatory actions but cannot afford the requisite legal assistance. The agency's policy necessarily inhibits those who may have legitimate grievances.

FINDINGS

Interstate Commerce Commission (ICC)
Civil Aeronautics Board (CAB)
Federal Power Commission (FPC)

1. The Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Power Commission were created to exercise independent regulatory control in the public interest over the surface and air transportation and utilities industries.

2. The employment patterns of the industries regulated by ICC, CAB, and FPC attest to a severe underutilization of minorities and women in all but the lowest level job classifications. Despite this obvious problem, ICC, CAB, and FPC have failed to act decisively to ensure equal employment opportunity in the trucking, airline, and utilities industries.

   a. ICC and CAB have not taken any action although a rulemaking petition pertaining to equal employment opportunity has been pending at ICC since January 1972, and at CAB since September 1972.

   b. FPC has refused to acknowledge that it has either the authority or the obligation to adopt equal employment guidelines covering any of its regulatees.

3. The focus of efforts by ICC and CAB to ensure nondiscrimination in the services provided by the industries they regulate continues to be primarily complaint oriented, and neither agency has instituted any significant affirmative program to monitor the civil rights compliance of their licensees.

4. FPC, in contrast, has developed a program of special reviews of recreational facilities at licensed hydroelectric projects to determine minority usage, in addition to yearly reviews of such facilities which include a civil rights element. The special reviews, however, are limited in number and although low minority utilization rates have been identified at various projects, FPC has required the initiation of no corrective action. The regular yearly reviews, moreover, treat civil rights only superficially.

5. ICC continues to restrict severely minority entrepreneurship in the trucking industry through its licensing procedures which tend to protect the existing certified motor carriers.

6. Although each offers copies and explanations of their rules and regulations to the public, neither ICC, CAB, nor FPC has instituted a program to provide free legal counsel to individuals who wish to challenge regulatory actions, but who are financially unable to do so.

Chapter 3

FINDINGS

Securities and Exchange Commission (SEC)

1. The Securities and Exchange Commission is charged with the regulation of the securities industry to ensure the fullest possible disclosure to the investing public and to protect the interests of the public against fraud.
2. The securities industry has a poor record in the employment of minority group members generally and in the employment of women in positions above the clerical level. The underemployment and underutilization of both minorities and women is particularly striking in sales and management positions. Although it has acknowledged statutory authority to act in the area of discriminatory employment practices, SEC has refused to adopt mandatory equal employment guidelines for the securities industry.
3. SEC has issued specific guidelines requiring registering companies to disclose information concerning civil rights matters to potential investors and has instituted a monitoring system for those disclosures. Although the agency has improved significantly the guidelines for disclosures of civil rights matters, there are detailed requirements binding on environmental disclosures which do not apply to civil rights issues.
4. In addition, SEC has begun to investigate the feasibility of establishing systematized communications with Federal agencies involved in civil rights litigation to aid it in monitoring registrants' adherence to SEC regulations. It has indicated an unwillingness, however, to seek

similar cooperation from the private groups which are responsible for most of the litigation in the equal employment opportunity area. SEC has amended its proxy proposal guidelines governing the subject matter which can be raised by stockholders. Proposals of civil rights impact can now be introduced provided they are significantly related to the business or within the control of the company.

Chapter 1

RECOMMENDATIONS

Federal Communications Commission (FCC)

1. FCC should strengthen its enforcement of its rules prohibiting employment discrimination by its licensees. Accordingly, it should promptly conclude its consideration of proposals for civil rights compliance programs for broadcasters and telephone and telegraph companies. Its new program should include the following:

   a. The job categories utilized by FCC in the annual employment reports required of licensees should be narrowly defined and based on actual industry positions.

   b. The guidelines for licensees' equal employment opportunity programs should be strengthened. FCC's licensees should be held to the substantive standards set by the Equal Employment Opportunity Commission, as enunciated in its decisions and various guidelines. The affirmative action procedures required of licensees should be those set forth in Revised Order No. 4 by the Office of Federal Contract Compliance in the Department of Labor. FCC should also develop appropriate enforcement mechanisms, such as compliance reports and a system of periodic compliance reviews.

c. FCC should develop a more active and responsive system for processing civil rights complaints against licensees, with more emphasis on field investigation, contact with complainants, and background research concerning the entities regulated. Complaints should be further utilized as a continuing index of licensees' compliance with nondiscrimination prohibitions and not be allowed to remain pending until license renewal time. Immediate responses, such as calling for early renewals of licenses, should be initiated by FCC when civil rights complaints against licensees are substantiated.

d. To identify those licensees who should be subject to special reviews at license renewal time of their employment practices, FCC should develop priority selection standards which will isolate those broadcast stations which offer the greatest employment opportunities and whose employment practices reflect a pattern of underutilization of women and minorities. In addition, special attention should be paid to those broadcast stations which fail to report in their license renewal applications any statistically meaningful changes in their employment profiles over a reasonable period of time as a result of previous equal employment opportunity programs.

2. FCC should grant hearings on petitions to deny license renewals which are based on civil rights grounds to the same degree to which other regulatory questions are designated for hearings.

3. FCC should amend its licensing procedures to conform with a recent U.S. court of appeals ruling ordering the agency to take into consideration the fact that, in a community with a significant minority population, one of the competing applicants for a broadcast station was partly owned by minorities. Similar consideration should be given to competing applications which are filed by women.
4. FCC should continue and expand its program of meetings around the country with minority, female, and industry groups.
5. FCC should increase the staff and authority of its unit responsible for coordinating the agency's civil rights compliance program. The location of the unit in the agency should be changed so that it is structurally located in the Office of the Chairman.
6. FCC should provide free legal counsel to individuals and groups who wish to participate in agency proceedings or challenge regulatory actions, who are financially unable to do so, and whose position presents important public interest, legal, or policy issues.

Chapter 2

RECOMMENDATIONS

Interstate Commerce Commission (ICC)
Civil Aeronautics Board (CAB)
Federal Power Commission (FPC)

1. The Interstate Commerce Commission and the Civil Aeronautics Board should conclude the equal employment opportunity rulemakings pending at each agency. They should adopt rules which require companies they regulate to eliminate discrimination and take affirmative action to increase minority and female employment. Their regulatees should be held to the substantive standards set by the Equal Employment Opportunity Commission, as enunciated in its decisions and various guidelines. The affirmative action procedures required of regulatees should be those set forth in Revised Order No. 4 by the Office of Federal Contract Compliance in the Department of Labor. ICC and CAB should also develop appropriate enforcement mechanisms, such as compliance reports and a system of periodic compliance reviews.

2. FPC should re-evaluate its position against adopting equal employment guidelines covering its regulatees. It should adopt rules which prohibit employment discrimination by its regulatees and which require them to take affirmative action to increase minority and female employment. Its regulatees should be held to the substantive standards set by the Equal Employment Opportunity Commission, as enunciated in its decisions and various guidelines. The affirmative action procedures required of

regulatees should be those set forth in Revised Order No. 4 by the Office of Federal Contract Compliance in the Department of Labor. FPC should also develop appropriate enforcement mechanisms, such as compliance reports and a system of periodic compliance reviews.

3. ICC and CAB should establish affirmative compliance mechanisms to ensure nondiscrimination in the services provided by their licensees. Such a program should require, at a minimum, that trucking, bus, and airline licensees file annual reports on the discrimination complaints they have received, and that the agencies should review onsite the activities of these licensees. In addition, complaint processing should be used by ICC and CAB as an index of possible discrimination in these industries and to identify where special compliance efforts by the agencies or affirmative action efforts by licensees are required.

4. FPC should incorporate the major elements of its special reviews of minority utilization at recreation facilities into its regular yearly reviews of recreation facilities at hydroelectric projects. The yearly reviews should, thus, include interviews of minority group recreationists and minority group community leaders, and comparative analysis of the rate of minority group utilization at each project reviewed and the percentage of the population in the recreation facilities' user area that is minority.

5. Where low minority utilization rates are identified, FPC should require its licensees to adopt an affirmative program to increase minority utilization of the recreation facility. Such a program should consist, at a minimum, of regular meetings between licensee officials and minority group community leaders.

6. ICC should encourage minority and female participation in the trucking industry by amending its licensing procedures so that new applicants who establish a need for their services or can provide services on a more efficient and economical basis can compete with existing certified motor carriers.

7. ICC, CAB, and FPC should provide free legal counsel to individuals and groups who wish to participate in agency proceedings or challenge regulatory actions, who are financially unable to do so, and whose position presents important public interest, legal, or policy issues.

Chapter 3

RECOMMENDATIONS

Securities and Exchange Commission

1. The Securities and Exchange Commission should adopt rules which prohibit employment discrimination by the securities industry which requires it to take affirmative action to increase minority and female employment. The securities industry should be held to the substantive standards set by the Equal Employment Opportunity Commission, as enunciated in its decisions and various guidelines. The affirmative action procedures required of the securities industry should be those set forth in Revised Order No. 4 by the Office of Federal Contract Compliance in the Department of Labor. SEC should also develop appropriate enforcement mechanisms, such as compliance reports and a system of periodic compliance reviews.

2. SEC should issue guidelines requiring registrants to provide potential investors with information on administrative or judicial proceedings arising under any Federal, State, or local law relating to civil rights. These disclosures should be required regardless of the amount of the claims for damages or the registrant's assessment that the proceedings are routine.

3. As a means of monitoring the compliance of registrants with its civil rights disclosure guidelines, SEC should establish a system through which, on a regular basis, Federal or State agencies and private civil rights groups will inform it of any administrati or judicial actions which allege that an SEC regulatee is guilty of discriminating in its employment practices against women or minorities.